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Office Supreme Court U.S.
FILED
JAN 11 1901
JAMES H. McKENNEY,
Clerk.

No. 1

Brf. of Horton, Guthrie & Waggener
for Appts. On reargument

Supreme Court of the United States.

OCTOBER TERM, 1900.

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No. 7.

CHARLES U. COTTING and FRANCIS LEE HIGGINSON, *Appellants,*
vs.
A. GODARD, Attorney-General of the State of Kansas, and the KANSAS CITY STOCK-YARDS COMPANY ET AL.
Consolidated suit.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF FOR APPELLANTS ON REARGUMENT.

ALBERT H. HORTON,
WILLIAM D. GUTHRIE,
B. P. WAGGENER,
Of counsel for appellants.

WASHINGTON, January, 1901.

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STATEMENT OF FACTS.

The present subject of inquiry is as to the validity, under the Fourteenth Article of Amendment to the Constitution of the United States, of an act of the legislature of the state of Kansas (approved March 3, 1897; record, pp. 41–42) prescribing maximum rates to be charged by certain stock-yards within the state. The effect of the statute is to reduce the customary charges of the defendant, the Kansas City Stock-Yards Company, from 25 cents per head for cattle to 15 cents, from 10 cents for calves to 8 cents, from 8 cents for hogs to 6 cents, and from 5 cents for sheep to 4 cents. The annual income of the company would be reduced $300,651.77, the equivalent of a reduction in net income of 63 per cent. according to the contention of the appellants or the equivalent of a reduction of 28 per cent. according to the contention of the Attorney-General of Kansas. The owners of the stock-yards contend

that the act arbitrarily deprives them of property without due process of law and denies to them the equal protection of the laws by reducing the charges to an unreasonable rate and by preventing them from collecting the fair value of the service they render to the class of the public using the yards for its individual convenience and pecuniary profit.

The property of the Kansas City Stock-Yards Company, which was established in 1871 and is located partly in Kansas City, Kansas, and partly in Kansas City, Missouri, is indisputably of immense value, whether we consider the amount of money actually invested or the value to which the property has appreciated by reason of the marvelous growth of Kansas City and the great increase of all values there. The master reports the value of the real estate used for stock-yards purposes at $3,600,626, the value of the buildings, etc., at $1,480,000 and the value of the personal property used in the business at $307,377.25, making a total valuation of $5,388,003.25 (p. 77), after excluding $1,200,000 of other property (p. 76), and these valuations, it is insisted by the appellants, are insufficient and unfair.

The act in question provides that stock-yards which have had "for the preceding twelve months . . . an average daily receipt of not less than one hundred head of cattle, or three hundred head of hogs, or three hundred head of sheep, are hereby declared to be public stock-yards," and "any person, company or corporation owning or operating any public stock-yard or stock-yards in this State is hereby declared to be a public stock-yards operator, whether living or being within this State or not" (p. 41). It is then provided, among other things, that the maximum charge of owners of such stock-yards within the state for "driving, yarding, watering and weighing of stock" shall

not be greater than 15 cents per head for cattle, 8 cents per head for calves, 6 cents per head for hogs, and 4 cents per head for sheep, and that but one charge shall be made for all these services. The act also provides that it shall be unlawful for the owners of *any such* stock-yards to sell hay at the rate of less than 2,000 pounds for a ton or any part thereof, or "to charge for or to sell the same at more than one hundred per cent. above the average market price or value of such hay upon the markets of the towns or cities wherein such stock-yards are located, upon the day preceding such sale and delivery," or to deliver less than 70 pounds of corn in the ear for a bushel, or less than 56 pounds of shelled corn for a bushel, or to "charge for . . . or sell the same at more than one hundred per cent. above the average market price or value of such ear corn or shelled corn on the markets of the towns or cities wherein said stock-yards are located, on the day next preceding such sale and delivery." The act also provides that all other feed not specifically mentioned in the act shall not be sold for a greater percentage of profit than therein provided. Any person violating the act is to be deemed guilty of a misdemeanor, and, upon conviction, is to pay a fine for the first offense of not more than $100, for the second offense of not less than $100 nor more than $200, for the third offense of not less than $200 nor more than $500 and is to be imprisoned in the county jail not exceeding six months for each offense, and for each subsequent offense is to pay a fine of not less than $1,000 and is to be imprisoned in the county jail for not less than six months. The act expressly provides that it shall be the duty of the Attorney-General to prosecute all violations of its provisions.

Shortly after the act went into effect, and on March 13, 1897 (record, pp. 1-20), the plaintiff Cotting, a stockholder in the Kansas City Stock-Yards Company, filed a bill against the company and its officers and Louis C. Boyle, then Attorney-General of the state of Kansas, to restrain the officers of the company from complying with the act and the Attorney-General from enforcing its provisions on the ground that such compliance or enforcement would deprive the company of its property without due process of law, etc. After the filing of the bill in the Cotting suit, a substantially similar bill was filed by another stockholder named Higginson on March 26, 1897 (pp. 23–42). The second suit related to the same subject matter and sought the same relief, and the suits were therefore consolidated (pp. 50–51). The officers of the company had expressed their intention to comply with the act because of its severe penalties, which would have involved them in the risk of personal ruin if they had violated the act for one day, even for the purpose of having judicial proceedings brought to test its validity. The stringent provisions of the act, making criminal what had not been so before and involving the risk of fabulous sums in penalties (for the daily receipts average about fifteen thousand head, p. 94), so acted *in terrorem* that the officers dared not violate them, and the parties in interest were left practically remediless except by an appeal on the part of stockholders to a court of equity to protect their property rights. The controversy not only arose under the Constitution of the United States, but there was in addition a diversity of citizenship and the fullest compliance with equity rule No. 94 (record, pp. 13-15, 19, 34-36, 39-40). The bills of complaint were in all respects within the doctrine of *Dodge* v. *Woolsey*, 18 How. 331, 341; *Pollock* v. *Farmers'*

Loan & Trust Co., 157 U. S. 429, 553, and *Smyth* v. *Ames*, 169 U. S. 466, 517.

As soon as the original bill of complaint was filed, an application was made for a preliminary restraining order including a direction to show cause, which was granted. Upon the return of this order, Foster, D.J., appointed a special master to take testimony and report to the court (record, pp. 43–44, 50–54), and in the meantime continued the restraining order in force. An immense amount of testimony was taken by both sides before the master during the course of what may be termed an unusually bitter adversary contest, and this testimony and the master's report thereon (pp. 57 *et seq.*), together with the final decree, are now before this court for consideration and review.

The Attorney-General of Kansas appeared generally in the suit, and the jurisdiction of the federal court was "not seriously challenged" (79 Fed. Rep., 679, 681) on the ground that the state was being sued in violation of the Eleventh Amendment until all the testimony had been taken at great expense and the litigation had been pending over seven months (p. 906). In the third ground of the demurrer originally filed but not printed in this record, the only plea of the Attorney-General on this point was that—

> "This defendant has no personal interest whatever in said controversy other than such as pertains to every citizen of said State of Kansas, and said State of Kansas is not made a party to said suit."

There was no plea to the jurisdiction. It was not until after all the testimony had been taken and the motion for a preliminary injunction had been denied by Foster, D. J., (record, p. 874), that the Attorney-General filed an answer and then for the first time

pleaded the Eleventh Amendment; but the point was not pressed or argued. Thereafter, Attorney-General Boyle expressly stipulated that the suit was not collusive as between the complainants and the defendant company (pp. 874, 875), and was quite satisfied to have the case submitted for final hearing on the merits, evidently in view of the fact that for several months he had conducted the examination and cross-examination of witnesses and every aspect of the controversy had been thoroughly litigated. Under these circumstances, it is submitted that the objection to the jurisdiction was waived. *Clark* v. *Barnard*, 108 U. S. 436, 447; *Brown* v. *Lake Superior Iron Co.*, 134 U. S. 530, 535; *Coburn* v. *Cedar Valley Land Co.*, 138 U. S. 196, 222. The only rule consistent with the due and orderly administration of justice in the federal courts must be that when an officer of a state is sued and intends to avail of the point that the judicial power of the courts of the United States does not extend to the suit, because virtually a suit against the state, he should at once challenge the power of the court to proceed further by a plea or demurrer to the jurisdiction, and cannot be permitted to play fast and loose with the situation, and proceed with the reservation that, if he is defeated on the merits, he may still insist upon want of jurisdiction (See *Hartog* v. *Memory*, 116 U. S. 588, 590; *Fitts* v. *McGhee*, 172 U. S. 516, 518, 524).

After the denial of the motion for a preliminary injunction by Foster, D. J., (record, p. 874), the Attorney-General filed an answer in each suit (record, pp. 877–906, 907–936); the consolidated suits were thereupon submitted for final hearing upon the pleadings, the testimony and exhibits and the master's report before Thayer, C. J., and Foster, D. J., and a final decree was entered dismissing the bills

of complaint with costs, but providing that the existing status as to the customary charges should be continued, pending an appeal to this court upon giving a bond in the penal sum of $200,000 to refund all overcharges for yarding and feeding live stock in Kansas or Missouri, in addition to the bond for $75,000 previously given (record, pp. 947, 948).

In dismissing the bill of complaint, the circuit court said, among other things (p. 945):

> "Conceding, as we must, that the legislation complained of was radical in its nature and effect, that it reduced the company's income about fifty per cent., and that it prevents it from realizing on the capital invested in its plant such a per cent. as is ordinarily realized on capital invested in other mercantile and business enterprises, still the court is not prepared to hold that the statute is confiscatory, and that it deprives the company of its property without due process of law. It is common knowledge that large sums of money are invested in securities which do not yield a return exceeding five per cent. on the investment, and it is further manifest that the business of the stock yards company as conducted is not subject to the same risks of loss from bad debts and declining prices which affect many other business enterprises."

In taking the testimony, both sides, for convenience, adopted the year 1896 as showing a fair average of business conditions, and the proofs, estimates and calculations were confined to the business conditions existing during that year.

In order to lessen the labor of the appellate court by avoiding, so far as possible, points of dispute as to the testimony, it may be conceded that the master's report (record, pp. 57–80) is substantially correct except as to the features of value and net earnings or profits, and except that in certain respects the facts found tell but half the

truth and tend to create erroneous impressions by omitting relevant facts. The findings which are challenged are numbers 16, 20, 34, 38, 40, 41, 43, 46 and 48 (pp. 64, 71–72, 74–80). The following statement of the facts which will supplement the master's findings is in more or less argumentative form, but as this will avoid unnecessary repetition, it is hoped that such a presentation may be excusable on a reargument. The facts which will require the most particular attention on the part of the court are (1) as to the discriminating features of the act, (2) as to the reasonable value of the services rendered, (3) as to the effect of the statute on the net earnings or profits, and (4) as to the basis of valuation of the property. It will be observed that the act in question does not purport to be a regulation of corporations as such but applies to individuals provided they come within the definition of "public stock-yards operators."

The Kansas City Stock-Yards Company is essentially a private corporation exercising no greater rights than individuals or partnerships. It has no special franchise, no privilege, and no legal or practical monopoly of any kind. It was organized in 1871 and reorganized in 1884 as a private business corporation under the Kansas statutes which then authorized and now authorize by general act any five persons to incorporate for any lawful purpose (Const. Kansas Art. 12; chap. 23, vol. 1, Gen. Stat. 1889, pp. 367–371; chap. 66, vol. 1, Gen. Stat. 1897, pp. 688–692). The company is engaged in an intensely competitive business with stock-yards located at Omaha, St. Joseph, St. Louis and Chicago. Similar yards may be started alongside in Kansas City or elsewhere at any time. The owners of live-stock are not compelled to use the Kansas City stock-yards as matter of necessity. Other yards can

be selected by the shipper, and nearly one-half of the shipments are consigned to other yards with privilege of sale at Kansas City. The proof shows that the business has been built up and sustained by advertising and the employment of solicitors constantly soliciting the shipment of cattle to the Kansas City yards (p. 195). The yards have no practical monopoly from their situation. This fact was conceded, for the contention of the defense below, throughout the taking of the testimony, was that other and cheaper lands were available for stock-yards purposes, and so the answer practically alleged (p. 880). The establishment of other stock-yards in the vicinity might ruin the business, and would certainly divide the custom and greatly reduce the income. The removal of the packing plants now situated on property adjacent to the present yards would at once destroy the market and deprive it of most, if not all, its custom. The stock-yards company exercises no power of eminent domain, and must pay for the property it uses or needs whatever price the private owner may exact. The proof shows that it was frequently compelled to pay more for much of its property than if it had been able to exercise the power to condemn. To use the expression of some of the witnesses, the absence of the power of eminent domain enabled property owners, in certain instances, to "hold up" the company in the purchase of necessary land (pp. 206, 234, 308, 494, 551), and compelled it to pay much more than the master allowed as the value of the property. Indeed, this feature, which in all fairness should have created an equity in favor of the stock-yards company, to be allowed more than the bare market value of the lands, and should have emphasized the reason why it ought not to be subject to legislative control to the same extent as a corporation exercising the great power

and advantage of eminent domain, was turned against it and pressed as a reason why the high prices paid by it should not be considered (see answer at p. 880). Thus, lands which actually cost over $60,000 an acre were reported by the master as worth only $45,000 an acre, and 22.858 acres which were purchased in 1895 at an actual cost of $1,289,239.73, or an average of $56,401.72 per acre, were likewise reported as worth only $45,000 per acre, or $1,028,610, although it appeared that the stock-yards company was even then unsuccessfully endeavoring to purchase adjoining property at $70,000 an acre (pp. 191, 232-233, 239–240). As matter of fact, the average cost of eleven acres (reported as worth only $45,000 per acre), was $88,097 per acre (pp. 191, 232–3).

The stockholders of the stock-yards company hazarded their capital upon a doubtful and uncertain industrial speculation (pp. 354, 442, 458, 459) and they have succeeded solely through the energy and capacity of the managers and the investment and risk of a large capital. The venture, it is true, has turned out to be successful. The owners of the stock-yards have built up an industry and a market where there is now transacted more than thirty times the amount of business done in 1871. They have created a great market where previously there was nothing but a feeding yard (pp. 93, 127, 184), and their efforts have resulted in establishing a valuable and remunerative business, which has steadily grown, with the development of the surrounding territory, to the "present magnificent proportions" reported by the master (p. 60). During the period of twenty-seven years covering the almost unprecedented growth of the city and the wonderful development of the market, the real property of the company, most of which was purchased from 1871 to 1879, has greatly increased in value. When the stock-yards were

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established, the land taken for that purpose was wild, covered with trees and surrounded by prairie or sand banks (pp. 93, 127), and there was no market (p. 185). These lands are now in the centre of the industrial business portion of a great city; they are surrounded by a vast system of railroad tracks and terminals, and immense packing and industrial concerns are situated immediately and conveniently adjacent.

But in considering the advantages which have accrued to the stock-yards company from the conditions now existing at Kansas City, it must not be forgotten that the company was itself largely instrumental in creating those conditions. For instance, it spent large sums of money in subsidizing packing plants, and thus procured their establishment at Kansas City instead of elsewhere; and these packing plants created the market to which in great degree Kansas City owes its prosperity. We thus find that while the business of the company has been profitable to its owners, the benefits to Kansas City and to the state of Kansas have been immeasurable. The striking manner in which the city and the stock-yards have grown together will be shown by a few well-known statistics.

Kansas City was but a small village when the Union Pacific Railroad Company reached it in 1865. At the time the census of 1870 was taken, there was no such town as Kansas City, Kansas, to which to assign any population or property value. Indeed, in 1880, its population was only 3,200, which increased to 38,316 in 1890, to 41,150 in 1897, and to 45,000 in 1898, an increase of over 1,400 per cent. since the stock-yards were established. The assessed valuation of the real property in the whole county of Wyandotte, Kansas, which was $1,612,342 in 1870, had increased to $10,895,371 in 1890.

The products of all the industries in Wyandotte county, which in 1870 amounted to $755,051, were $58,132,679 in 1890. The value of the meat-packing product, which in 1870 was absolutely *nothing*, had in 1890 already reached $39,927,192. The number of head of live stock yarded in 1871 was 167,199, of the value of $4,210,605, and in 1896 the number of head yarded was 5,471,246, of the total value of $103,402,298, an increase in number of 3,300 per cent. and an increase in value of 2,500 per cent. So also as to Kansas City, Missouri. The population, which in 1870 was 32,260, had become 132,716 in 1890, and was 160,000 in 1897 and 175,000 in 1898. The assessed valuation of the real and personal estate in the whole of Jackson county, Missouri, which in 1870 was $16,103,332, had increased to $95,932,877 in 1890. The bank clearings of Kansas City which were only $20,407,967 in 1875, were $540,837,381 in 1897. The evidence also shows marvelous increases in values of land. Conspicuous instances were cited of property worth $1,000 to $2,000 per front foot (p. 488), and one witness testified that land which he could have bought for $75 an acre twenty years ago was now worth $1,000 a front foot (p. 562), which would be the equivalent of $250,000 per acre, or an increase of over 3,000 times the value twenty years ago. It is, therefore, not astonishing that the Attorney-General of Kansas should have stated on the original argument that "we recognize the fact that this property has greatly increased in value since the organization of the stock-yards" (brief on original argument, p. 77).

We may now proceed to group the facts under the principal heads suggested by the issues, namely, (1) as to the value in themselves of the services rendered (pp. 13–22); (2) as to the effect of the statute on the earnings of

the stock-yards company (pp. 22–32); (3) as to the value of the property and the capital invested (pp. 32–41); (4) as to the stock dividends (pp. 41–46), and (5) as to the feed charges (pp. 46–51).

I.

As to the value in themselves of the services rendered.

In considering the value in themselves of the "driving, yarding, watering, and weighing" services rendered to the owner of live stock using the yards for his convenience and profit, the first feature that stands out prominently in the record is that the yardage and attendance are free unless the live stock is actually sold at a price satisfactory to the shipper. The owner of cattle, etc., has the privilege of using the yards as long as he pleases without any charge whatever unless he finds a buyer at a price satisfactory to himself, and no matter how many sales there may be of the same live stock, only one charge is made (p. 403). Nearly one-half of the live stock is consigned to Chicago or other yards, with privilege of sale in Kansas City (pp. 69, 152, 165), for the very purpose of being sent elsewhere if the owners are not satisfied with the price obtainable. There is, therefore, free use of the yards and no compulsion as to the payment of yardage. The stock-yards company practically guarantees a better market than elsewhere; and unless it continues to maintain its market, so that the prices are better than in other yards, fully one-half of the shipments will be at once diverted to Chicago or other points, and the business turned at once from a profit to a loss. The owner of live stock is also entitled to keep his cattle in the yards without extra charge, until he finds a satisfactory market, even if this should take a year (p. 403). For this reason and for others shown in the testimony (pp. 359, 360, 363, 364–367, 405), the

company must provide accommodations for the maximum possible requirements, and if the market—that is, the buyers—fail them, it will lose not merely the profit, *but the cost of operation and maintenance.* This consideration of free driving, yarding, watering, etc., was given no weight below; yet it surely bears upon the question as to the value of the service rendered by these yards to the owners of live stock and upon the claim that the customary charges are reasonable.

The second prominent feature in connection with this branch of the case is that the yards are kept in better condition and have more facilities than the yards at other points, and that the owner of live stock consequently obtains better prices than elsewhere (pp. 74, 123). These better prices are undoubtedly the result of the greater facilities and accommodation furnished and of the expenditures made by the company in inducing packing plants to locate in the immediate vicinity of the yards, and of the soliciting referred to above (p. 195). It appeared and the master found that during the test year selected by consent—namely, 1896—the owners of live-stock realized more than $1,500,000 in excess of the prices they would have obtained if the live-stock had been forwarded to Chicago (pp. 74, 123); that is to say, *they realized, in excess of the prices obtainable elsewhere, enough to pay for all yardage and feed collected by the Kansas City company, and over $600,000 besides!*

The mere furnishing of yardage and pens and free use of railroad tracks and railroad terminal facilities (pp. 292, 392) and of an immensely valuable plant is a small part of the services rendered. The legislature so understood and intended to reach and regulate not only yardage but "driving" and "watering" and "weighing." The cattle

are received by the stock-yards employees from the railways at the shutes, and the responsibility of the stock-yards company begins from that time and continues until delivery to the buyer. These employees drive the stock to the pens, which may be selected by the owner; and one carload may be distributed into twenty pens, if the owner so desires, in order to exhibit his shipment advantageously. The live stock is fed and watered by stock-yards employees. The next step is to weigh each lot of stock and record the weights. The live stock is then delivered either to the packing houses or to the railroads according to the lots sold. The stock-yards company is compelled to have constantly on hand a large force of men (some 346, pp. 359, 367, 370), many of whom are highly skilled in the business. The company is not only liable for accidents, but it practically guarantees all the records and weights, and assumes responsibility for deliveries, etc. Indeed, everything that an owner of live stock would at any ordinary market have to do for himself is done for him by the clerks and yardmen of the company, so as to facilitate prompt and satisfactory sales. The detail of the business may be imagined from the example testified to by one of the witnesses, who showed an instance of the making of twenty-one separate entries, receipts, notices or documents as necessary in connection with the yardage of one lot of cattle. The skill, ability,energy and fitness of the employees for the performance of these services is reported by the master (p. 74). In addition to the services already mentioned, the company maintains a sheep dip for the use of shippers. This plant is owned by the stock-yards company, and is furnished free to parties who are required by law to dip their sheep (p. 134). The company also main-

tains quarantine yards, which it operates under the orders and directions of the Department of Agriculture and without additional charge to the shipper. The testimony shows that these yards put the company to considerable expense of a different character from that of the main yards. It has to maintain a separate force for handling the stock received at the quarantine yards, and these yards have to be disinfected and cared for under the instructions of a government inspector (pp. 361–362, 381, 407, 414, 420, 603–604). And for all these services rendered and benefits conferred, the cattle owner pays twenty-five cents per head of cattle as against an average selling price of forty dollars per head (p. 147); in other words, about one-half of one per cent. of the price actually realized, and then only in case of satisfactory sale (record, pp. 64, 104, 108, 109, 119, 120, 132, 134, 147, 148, 151, 157–160, 162, 249, 359, 362–365, 371, 372, 383, 384, 393, 402, 405, 419, 421, 426, 427, 428, 464–469, 472).

The Kansas City Stock-Yards Company has for many years made the same charge for yardage, weighing, feeding, watering and other services as has been usual in all other stock-yards; and between the yards at Kansas City and those at other points "there is and was for a long time prior to March 12, 1897, active and growing competition among their owners to attract and secure to each the shipment of live stock from competitive territories" (pp. 64, 74, 326, 457, 467, 472). The charges are nowhere less than at Kansas City (p. 797). The master found that the customary charges collected for many years at the Kansas City stock-yards are identical with those at twelve other stock-yards, and that the customary charges for feeding, etc., were either identical with or less than those of other yards (pp. 64, 65). There is no agreement

among the stock-yards companies to maintain these rates, and they have existed for a quarter of a century at the other yards (p. 458). It appeared that the stock-yards company prior to 1891 (p. 128) had charged twenty cents per head of cattle, or five cents less than the customary charge at other yards (p. 64). The managers found that the lower charge was doing no particular good, and they deemed it wiser to increase the rate to the customary charge and expend the additional income in adding to the facilities and accommodations at the Kansas City yards (pp. 143, 151, 398, 400, 401). In any aspect, however, the fact that four years before the act in question the stock-yards company had charged twenty cents, or five cents less than the customary rate, cannot tend to establish that *fifteen* cents is reasonable. Since 1894 nearly $700,000 have been spent for improvements on the property (pp. 337–339), and the service is better (pp. 400–401). It must be evident that, if the customary charges had been or or were excessive, the force of competition would have led to a reduction. The reason why the competition has not produced any reduction is that the charge in itself is low, and that it is infinitely more important to increase the facilities and accommodations and to create a constant demand and stable market (pp. 402, 441). The charge is so small and reasonable that in itself it would not affect the market. The facilities for trade, the constant demand, the proximity of packing houses, the soliciting and advertising, the accommodations furnished, the presence of buyers—these are the features that make a market, and not the yardage charge. If the stock-yards company must now reverse its policy, cease making improvements and developing its business, the market will, in a very few years, go back to Chicago and other yards. It is in truth

no exaggeration to assert that, if the company made absolutely no charge for yardage, the market, far from increasing, would, in fact, be destroyed if the facilities and accommodations now furnished were curtailed, the solicitors withdrawn, and the packing plants which the stock-yards company helped to establish were removed.

In addition to the proof that at all the large stock-yards of the country the customary charges were substantially the same as at Kansas City, the complainants called two competent expert witnesses, who had been for many years connected with other stock-yards, the one witness, Palmer (p. 450), being the general manager of the St. Louis stock-yards, and the other witness, Babcock (p. 466), being the general manager of the Omaha stock-yards, and both these witnesses testified that the customary charges were fair and reasonable (pp. 465, 472). The manager of the Kansas City yards further testified that they could not charge less and keep up the quality of the service (p. 151).

Upon this question of reasonableness of the rates, the Attorney-General called only two witnesses, Peck and Jaquins (p. 787, 792). Jaquins was a member of the legislature which passed the act in question and had served as chairman of the Live Stock Committee which formulated the act (pp. 792, 796). Such a witness was obviously not disinterested, nor was he a fit *judge* upon the reasonableness of the charges embodied in the act which he himself had helped to pass and had probably drafted. An examination of Jaquins' testimony will show that he was quite prejudiced, and, besides, utterly incompetent upon the question of the reasonableness of the customary or of the statutory charges. He testified that he did not know anything about the service rendered at the

Kansas City yards since 1894 (p. 794), that no cattle shipper could get the same service for less money in any other big market (p. 797), and that the last time he had sold any cattle at the Kansas City market was " two years ago last fall " (p. 798).

Now all that this witness could testify to upon the point of reasonableness—and this is the only testimony in the whole case which the Attorney-General was able to produce upon this vital point—was as follows (pp. 794–795):

> "Q. (By Attorney-General Boyle). Are you familiar with the provisions of the act of the legislature approved March 3, 1897, which is an act defining what shall constitute public stock-yards, defining the duties of the person or persons operating the same and regulating all charges thereof, and removing restrictions in the trade of dead animals, and prescribing penalties for the violations of this act?
>
> A. Yes, sir.
>
> Q. I wish you would state whether or not, in your judgment, the charges therein provided for are reasonable and fair. . . .
>
> A. Yes, sir; my judgment is that they can make money under those charges.
>
> Q. I will ask you, if in your opinion, the charges are reasonable and fair to the stock-yards company?
>
> A. Yes, sir."

The only ground which he could assign for concluding that the charge was unreasonable was the following (pp. 797, 798):

> "Q. I understand you think the charges of the company are unreasonable?
>
> A. Yes, sir.
>
> Q. What makes you think so?
>
> A. I think they are making more out of their business than any other class of people.
>
> Q. Is that the reason you think they are unreasonable?
>
> A. Yes; *I think that things ought to be sort of equal in their profits.*

Q. You don't know of any place where cattle can get the same service for less money?

A. Not in a large market like that; but I think they have all pooled on that figure, and they won't take less than a certain price. That is my judgment about it.

Q. Do you know whether they have pooled or not?

A. Nothing positive; no.

Q. I mean of your own knowledge?

A. No."

He further testified as follows (p. 802):

"Q. In the case you have taken, you do not consider the value of the market there?

A. Nothing at all.

Q. Nothing about the cost of the yards?

A. No, sir.

Q. Nothing about the cost of their structures?

A. No, sir."

In regard to the Wichita market, Jaquins testified as follows (p. 798):

"Q. Do you know about the Wichita market?

A. Yes, sir; the Wichita market has never yet got centralized with packers enough to make a market; besides, they have labored under great difficulties with the railroad companies; they can't get any cut rates down there in that country like they seem to have on the Missouri river; besides they have only two packing-houses, and they are very small."

Peck, the other witness called upon this point, lives at Jamestown, and has a yard there (p. 788). He feeds his cattle on the cars, and seemed to have the idea that the charges of the Kansas City yards were not satisfactory to him. A sample of his testimony will be interesting. Thus, at pp. 790–791:

"Q. Why do you send your hogs to Kansas City?

A. Send them there to the market.

Q. Why not to Chicago?

A. It is too far.

Q. Did you ever send any hogs to Chicago? Did you ever fail to sell any hogs you sent to KansasCity?

A. No, sir.

Q. What do you think about the market in Kansas City for hogs?

A. I think it is a very good market.

Q. Do you know of any market in this country that is as good for hogs?

A. I don't know as I know of any better.

Q. How much do they charge you for yardage on hogs?

A. Eight cents a head.

Q. You think that is too much?

A. I think it is rather high, yes.

Q. Why do you think so, Mr. Peck?

A. I think so because a person could do it for less money and make good wages.

Q. Do you know any place in this country where you can get it for less money?

A. No, sir.

Q. Why do you think it can be done for less money?

A. I could do it for less money if I had a chance to do it.

Q. You think you could give shippers a market for their hogs?

A. I think *I could if the packing-houses would come out to my yards.*

Q. Wouldn't you want something more than packing-houses?

A. I think that would be enough.

Q. Wouldn't you want buyers?

A. I think the buyers would come.

Q. So you think if the packers and buyers would move out around your yards at Jamestown, you could give them your yards, and furnish yardage at less than eight cents?

A. Yes, sir.

Q. Did you ever run stock-yards?

A. No, sir.

Q. Do you know what it costs to run the Kansas City stock-yards?

A. No, sir."

It is difficult to treat such testimony seriously or patiently. In view of the absolute want of any competent evidence whatever on the part of the Attorney-

General in regard to the value in themselves of the services rendered and the reasonableness of the statutory charges, the testimony adduced on behalf of the complainants as to the customary charges at other yards and their fairness and reasonableness should, according to all ideas of due proof in a court of law, be conclusive, if the question of reasonableness in these rate cases is to remain a matter for judicial determination.

2.

As to the effect of the statute on the earnings of the stock-yards company.

The year 1896 was taken by consent as above explained, because it presented fair average conditions upon which to test the operation of the statutory schedule. During that year, the gross receipts for yardage at the customary rates were $665,658.05, and for feed, &c., $224,690.88, so that the total gross receipts for the services regulated by the act of March 3, 1897, amounted in 1896 to $890,348.93 (p. 72). If, however, the statutory rates had prevailed instead of the customary charges, the gross receipts for yardage, etc., would have been reduced to $441,180.48, and for feed, &c., $148,516.68, so that the total gross receipts would have been $589,697.16, a reduction of $300,651.77, or more than one-third (pp. 72, 73). That this is the extent of the reduction is conceded. The Attorney-General of Kansas stated in his brief on the original hearing in this court that (p. 54): "The master found, and it is conceded, that the application of the Kansas statute to the business of 1896 would have reduced the gross income $300,651.77." The effect on the net income would have been equally radical. The net earnings in 1896 applicable to dividends were at the customary rates, $476,974.08 (p. 71), assuming that the items in finding

33⅓ were properly chargeable to earnings. The net earnings under the statutory rates would have been $176,322.31, a reduction of $300,651.77 (p. 73), or 63 per cent.

To state the result in different terms, the gross receipts of the business affected by this legislation at the existing customary rates in 1896 were, as we have just seen, $890,348.93 (p. 72); the minimum cost of operation without allowance for renewals or repairs was 35 per cent. (pp. 199, 235, 240), or $311,622.13, leaving net $578,726.80. If we allow ten per cent. of the cost of the plant (p. 350) for repairs, renewals and depreciation, or $159,303, the net would be $419,423.80, and if we deduct the statutory reduction of $300,651.77, we shall have left only $118,772.03.

The Attorney-General of Kansas, however, contends that certain items, amounting in the aggregate to $169,584.65, and representing expenditures for betterments, improvements and extensions, should not have been paid out of profits, but should have been capitalized, or, as alleged in the answer, (p. 884) "it would be proper to issue additional stock if necessary to raise funds for the purpose." These improvements, betterments and extensions were mostly in renewal of existing facilities in the old yards (pp. 338, 340), or were made in order to better accommodate the business of the yards, but it appeared by uncontradicted testimony that they did not tend to increase the income or earning capacity of the company (pp. 240, 317).

A full description of these improvements and betterments will be found in a stipulation which the parties entered into "for the purpose of removing any question which may exist in regard to the manner in which the

earnings of the stock-yards company were disbursed during the years 1892, 1893, 1894, 1895 and 1896 for operation, maintenance, and extensions of improvements" (p. 82). The items of 1896 consisted of actual cash expenditures for rebuilding or replacing parts of the existing plant, completing buildings, laying brick pavement instead of plank flooring which had worn out, etc. (pp. 89–91). There has heretofore been no suggestion that this construction was not absolutely necessary, or was not paid out of earnings. In fact, the master reported that "the affairs of said company have, from the standpoint of the stockholders therein, been wisely, efficiently and economically administered, and its operating expenses and *cost of maintenance have been necessary* to properly transact its business and successfully carry out the purposes for which it was incorporated" (p. 74). But, because most of the items of maintenance in 1896 were improvements of the existing plant, costing as to the principal items—*e. g.*, the brick pavement instead of wood—much more than the old plant replaced, it was insisted that the expenditure must be capitalized, although not increasing the earnings and although any conservative business management would provide for such necessary maintenance or renewals out of income.

The reasons why the managers of the company did not feel justified or warranted in capitalizing these improvements in 1896 were explained in the testimony. Thus, it was shown that the expenditures were of the usual character (pp. 198, 199, 235, 236, 240, 336)—that is to say, every year some different part required renewal or improvement or extension. It was also shown that the improvements did not constitute any extension of the existing system (pp. 240, 317), that the present facil-

ities were simply renewed or reconstructed (p. 340), that the larger part of the expenditure was upon the old yards and constituted renewals (p. 338),that depreciation even with constant repairs will be fully ten to twelve per cent. per annum (pp. 121, 235, 236, 237), and that the renewals are growing larger year by year (p. 199). Indeed, it was shown that the plant, which as it now stands has actually cost $1,593,038.07 (p. 350), does not in many portions last more than from three to five years (pp. 121, 443, 590, 591), that it was twice entirely rebuilt in the nine years between 1887 and 1896 (p. 213), and that it was practically all rebuilt within the last seven or eight years (p. 238). In Chicago, the stock-yards require rebuilding every five to nine years (p. 443).

The largest item of improvement during the year 1896 was for new vitrified-brick flooring for the pens and alleyways, which of itself represented an expenditure of $75,169.87 (p. 90). It was expected that the laying of this brick pavement would be concluded within three or four years (p. 235), and that after completion it would cost about $30,000 or $40,000 a year to maintain in repair (p. 236). The depreciation of this brick paving seems to have been assumed by Judge Foster as equal to two per cent. per annum (p. 871), when, as matter of fact, the only expert and qualified witness called as to the life of such a pavement was W. W. Atkin (p. 587 *et seq.*), who testified in answer to questions put to him by Attorney-General Boyle as follows (pp. 590, 591):

> "Q. What would be the average life of that pavement in the yards?
>
> A. Well, it would last from seven to ten years, probably. It is pretty hard to get at what the life of

that would be. In the alleys the life would be a good deal shorter than it would in the pens.

Q. Do you mean to say that a vitrified-brick pavement put down as that is put down in the yards would not last more than seven years?

A. It might, but I doubt it.

Q. How long does a vitrified-brick pavement last on the streets?

A. It has been known to wear out in the city inside of three years so it had to be replaced.

Q. Three years, then, is the average life of brick pavement in cities?

A. No; it is not the average, but they have been known to do it.

Q. What is the average?

A. Well, from four to five years.

Q. It is not the best and most durable pavement to put down?

A. Yes; it is supposed to be."

This was the only competent witness upon the duration of the life of such a pavement, although it is true that the complainants' witness, Morse, who had had no experience with brick pavement, testified that he thought the life would be from twelve to fifteen years, but this was corrected by Mr. Atkin as above, who was qualified from practical experience to testify to the facts. Judge Foster's basis of two per cent. depreciation would give the pavement a life of fifty years!

The accounts as prepared and kept by the stock-yards company do not show a dollar of allowance for depreciation in 1896. Undoubtedly this was because the managers considered that the improvements offset the depreciation. The court will note that no allowance whatever was made by the master for depreciation, although in valuing the property he did deduct for depreciation, and that Judge Foster allowed $75,400 for depreciation (p. 872), which was about five per cent. If, however, we take

ten per cent. for depreciation, which was the minimum testified to, the company would have to set apart *in addition to repairs* $159,303 every year. No entry was made in the profit and loss account. The reason is apparent. The actual improvements were $169,584.65, which was about equal to the depreciation. If they were paid, as they were, out of earnings, then earnings could not properly be debited with depreciation. It must strike the court as unfair that the master should, in reporting the present value of the plant, deduct for depreciation, but, in reporting the net earnings applicable to dividends, allow absolutely nothing for depreciation. The testimony shows that in the year 1896 $32,209.22 was expended in repairs (p. 70).

It is important to bear in mind that there is a distinction between repairs which must be made from time to time and the life of such a plant, which notwithstanding constant repairs, is limited. Atkin's testimony is to the effect that a brick pavement requires twelve to fifteen per cent. to keep it in constant repair (p. 590), but that the average life of the pavement would not probably last more than from seven to ten years (*ibid.*). The difference between repairs and renewal was well explained by one of the witnesses as follows (pp. 236, 237):

> "The impression has been given by witnesses that ten per cent. of the cost of structures applied to those structures each year would give us all practically new property. Now, that practically is not the case at all. The truth is that repairs begin to a limited extent as soon as a building is completed where it is exposed to this rough use in the yards, and the repairs continue for a certain length of time until the building or whatever it may be is regarded as not being worth repairing any longer, and then it

is taken down and replaced. To give an example of that, in 1889 the company built an extensive viaduct over the Union Pacific and Missouri Pacific tracks which cost a large amount of money. It was built as well as we thought it could be built for the purposes for which it was to be used. It has been in use ever since then. It has been kept in repair at a considerable expense ever since then. The planking has given out in the floors and some of the material is not so good as others. Whatever has been necessary to be done has been done to it both in the flooring and in the structure itself. Here a month or two ago, in the inspection which is going on, it was declared to be unsafe, and that there was nothing to do but to tear it down and build another; that it could not be repaired in such a way as to be fit for service and be safe for use, so it was condemned and a new structure is now being prepared to replace it; but in spite of the fact that it has been condemned and must be taken down and a new structure erected in place of it, right now there are repairs being made upon it which will require an expenditure of three or four hundred dollars in order to keep it going as long as possible, so that the cutting out of the use of it will be just as short as possible. I want to make that distinction between ordinary repairs which go on all the time and these renewals which come along from year to year. That would be true of every piece of property of a perishable character which we have about the yards. The same thing is true of the hog sheds. The hog sheds are kept in as good repair as possible all the time, but they only last a certain length of time, eight or ten years, then they have to be torn down and new ones constructed. It does not pay to try any longer to put in new posts and new material here and there in them. It is the same experience which every railroad company has with its rolling stock. I have had some experience in that line. A box car is said to have a certain length of life—ten years, we will say—but that does not mean that the car can be put upon the track and run for ten years, but it means that every month it must have some repairs, and, in spite of all repairs, after a certain length of time it must be taken into

the shop. The same is true of locomotives. They must be constantly repaired, but they have a pretty certain length of life and at the end of that time they have to be renewed."

The officers of the Kansas City Stock-Yards testified fully why they could not, in their judgment, capitalize these improvements and sell stock to provide the necessary funds, as had been done in the past. In addition to the facts stated above, they showed that the plant in 1896 had been completed (p. 237), that the construction account was closed (p. 238), that even in the past only a part of such expenditures were ever capitalized (p. 344), that the authorized capital stock of the company was $7,500,000 (p. 237), of which only $131,350 remained unissued (pp. 71, 238, 339), that this unissued stock had been reserved to buy additional *necessary real estate* (pp. 238, 239), that the business of the company had in their judgment reached its maximum (pp. 187, 238, 239, 325, 339, 385), and that there was then no anticipation of increase of business (p. 240). Mr. Morse, the general manager of the company, explained the situation at page 239 as follows: "It is my judgment and the judgment of those who have looked most carefully into the matter that we are very near the maximum point on our business at this time." In testifying again on this point at page 339, he said: "Another reason [*i. e.*, why the improvements of 1896 were not capitalized] was that we regarded the business as approaching a maximum now; it has not varied materially from year to year." In other words, the practical men who are at the head of this business considered that the receipts of live stock had reached the maximum number to be marketed in territory tributary to this market (p. 385), and that, consequently, the earnings would probably not increase.

In order to show that the business of the company had probably reached its maximum, the attention of the court is called to the figures shown in the testimony and exhibits on file. Thus, the total yearly receipts of the yards, as evidenced by the number of live stock handled, increased from 167,199 head in 1871 to 2,522,239 head in 1884, or over 1,500 per cent., and from 2,522,239 head in 1884 to 4,986,955 head in 1890, or about 100 per cent.; but between 1890 and 1896 the receipts increased to 5,471,246, or less than 10 per cent., of which increase nearly all was made in 1896 over 1895. The receipts of hogs since 1890 have never equaled those of that year (p. 385). The receipts of cattle from the state of Kansas, which in 1893 were 1,071,776 head, were only 363,430 in 1896, *a loss of 208,346 head;* the receipts of calves, which in 1893 were 57,000 head, were only 33,000 head in 1896, *a loss of 24,000 head;* the receipts of hogs, which in 1890 were 2,051,589 head, were only 1,625,848 in 1896, *a loss of 425,741 head;* and the receipts of sheep, which in 1893 were 295,000, were 294,000 in 1896 (p. 239). Although there was an increase in the total number of head in 1896, the average receipts of the seven years from 1890 to 1896 were less than the receipts of 1890.

Surely, it is then no pretense to say that these figures admonished the managers of the company that it was time to cease issuing new stock for improvements; and it is fair to assume that any court of equity, far from condemning, will applaud this conservative and honest policy. An industrial company may well be justified in capitalizing improvements while its business continues to increase; but, after the maximum has been reached, it would obviously be improper to sell new stock for improvements and make no provision for depreciation.

There was a mistake in the briefs of the Attorney-General filed on the original hearing in regard to this point. The statement was made that these improvements were actually capitalized in 1896, and stock issued to the stockholders to represent the expenditure (brief on original argument, pp. 50–52, 68). The record shows the contrary (pp. 237, 238, 339, 345), and the master so found (p. 71).

Referring to the item of $169,584.65 for improvements, the answer of Attorney-General Boyle states as follows (p. 885):

> "And the reasons for a failure to capitalize said improvements for 1896 were that there was a surplus in the treasury at Kansas City in excess of said amount, besides the large surplus in the Boston financial office, and the amount of stock that might be issued without amendment to the charter or filing a new charter was less than said sum, *and it was intended to use the remaining stock for the purchase of certain lands north of the north yards.*"

When we reflect that this statement in the answer was sworn to and filed after all the testimony had been taken, and after the application for an injunction had been denied by Foster, D. J. (pp. 874, 906), the answer must be taken as conclusively establishing the position that stock was not issued for the improvements made in 1896. The Attorney-General cannot be permitted now to change front and mend his hold by the claim that the improvements were in fact capitalized.

But, fortunately, the testimony also clearly establishes that no part of the outstanding stock, amounting at par to $7,368,653, was issued after June 25, 1896 (pp. 287, 339). The express finding of the master and court below, and the uncontradicted testimony is that the extensions of improvements made in 1896 *were not capitalized* (pp.

62, 71, 237, 238, 287, 345). There should be no misunderstanding upon this point in view of the explicit proof in the record. Mr. Morse testified at page 237 (and the expert who examined the books on behalf of the Attorney-General practically confirmed this, pp. 740, 741): "Q. State if any of the expenditures made from the gross earnings in 1896, other than ordinary operating expenses, have been capitalized—that is to say, represented by an issue of capital stock. A. No, sir; there has not. Q. Any of the operating expenses been capitalized, Colonel Morse? A. No, sir; they have not." And at page 345: "Q. You were asked something about the capitalization of earnings that were expended for construction or cost of maintenance in certain years. Were they capitalized in 1896? A. No, sir; they were not. Q. Can they ever be capitalized in the future? A. No, sir."

3.

As to the value of the property and the capital invested.

The master reported that the lands of the stock-yards company had cost $2,064,984.56 (p. 64), and had increased in value to $3,600,626 (p. 77). The appellants contend that the master's basis of valuation was erroneous, and that on any fair and legal basis of valuation the value of the land was at least $5,600,000 for stock-yards purposes (pp. 191, 192, 330–331, 344). The cash investment between 1884 and 1896 was $2,259,516, excluding $500,000 of stock issued to the Armours (pp. 218, 231, 289). The amount of profits re-invested since 1884 was $1,437,882, according to the testimony of Mr. Morse (p. 231). The evidence shows that stock to the amount of $1,562,483 has been issued to represent undistributed net profits invested and capitalized (see appendix A).

The real dispute between the parties at the time the testimony was being taken, as clearly shown by the record, was as to the basis of valuation of the real estate. The appellants contended below as here that the property of the company should be valued in its present condition as a stock-yard, to which special purpose the company's lands, by reason of their location and surroundings, were especially adapted. In other words, they insisted that the test should be the value to the stock-yards company itself of this particular property as if it were being taken for public use (*Monongahela Navigat'n Co.* v. *United States*, 148 U. S. 312, 341, 343). The Attorney-General of Kansas, on the other hand, contended that the valuation should be on the basis of bare land, irrespective of its special adaptability and particular value, to which might be added the value of the improvements at the mere cost of reproduction. Upon the question of the value of the land owned by the stock-yards company and devoted to stock-yards uses, the witnesses testifying as to values are to be divided into two distinct classes. In the first class are the witnesses called on behalf of the appellants, who either valued the property in its present condition, or valued the lands with particular regard to their special value for stock-yards purposes in view of their location and surroundings. In the second class are the witnesses called on behalf of the defense, who testified solely to the value of the property as bare or naked land without regard to its value with improvements or for stock-yards purposes. *There was not a single witness called on behalf of the Attorney-General who testified to the value of the property in its existing condition or for stock-yards purposes; but, on the contrary, all except one had to admit that they did not calculate or*

include any such purposes in their estimate of the value (pp. 619, 621, 666, 683–684, 696, 697), *and the testimony of the one witness who did not so state is of no value* (pp. 632, 637, 645). The portions of the record which establish the incontrovertible accuracy of this statement are set forth for convenience of reference in appendix B to this brief.

The theory of the defense below, therefore, was that the property was to be valued upon the basis of naked or bare land dissociated from its present or past use, and this rule was followed by the master in arriving at the conclusions stated in his report and adopted by the court below. As the master states in his report, "the evidence on this subject was all adduced on the hypothesis that the land was divested of all improvements, but upon consideration of all adventitious advantages accruing to it from its location and environment, and upon this basis my estimates of the value of such real estate are made" (p. 77). There can be no question that the master excluded all consideration of (1) the value of the property in its actual condition with its valuable improvements, and (2) the special value of the land in question for its most available and especially adapted purpose, namely, stock-yards. That this special value for stock-yards purposes is an entirely proper element in any estimate is emphasized by the argument of the Attorney-General in this court (brief on original argument, p. 70) that there must, of necessity, be large stock-yards at Kansas City, and that, "if the Kansas City stock-yards were to-day wiped out of existence another market-place would soon be found where all the business would be done, and as much business would center there as is now centered at these yards." The uncontradicted testimony is that no other equally available

ite exists in Kansas City (pp. 453–454, 634), and consequently *this* site must have a special value for stock-yards.

If we take the testimony of the appellants' witnesses, we shall find the value of the bare land divested of all improvements to be fully $5,600,000 for stock-yards purposes, or about $2,000,000 more than the master estimated (*e. g.*, 192, 330, 331, 344, 349). This would be an average valuation of about $40,000 an acre, or $4,000 a lot. The master only allowed an increase of $580,641 for the whole period from January, 1884, to June, 1897, or over thirteen years, the period of the greatest development of the city (p. 215). That the land had increased in value $995,000 between 1871 and 1883 was not disputed. This was the increase which was capitalized on the reorganization in January, 1884 (pp. 217, 218, 230, 231, 283–284). As matter of fact, the land has increased over $2,000,000 in value since January 1, 1884, instead of $580,641 as allowed by the master (pp. 491, 497, 507, 542, 543, 556, 563, 564, 571). Besides, the master erroneously excluded nearly $700,000 of real property (finding 41, pp. 75–76), which would have increased his valuation of the land to at least $4,300,000, leaving a difference of about $1,300,000. It is due to the stock-yards interests also to note that the testimony was taken at a period of extraordinary depression in values (pp. 442, 445, 489).

In addition to this value as bare naked land, we have great improvements, now worth, after deducting depreciation, fully $1,480,000 (p. 77), and used in connection with an immense and profitable business. It cannot be doubted that, as between men dealing in the markets of the world, the value of such a property would be more than the bare value of the naked land and of second-hand materials. If we allow any fair amount for this combination, we shall

easily conclude that the minimum valuation of $9,500,000 for the whole, as testified to by the complainants' witnesses (pp. 314, 319, 440, 453, 471), is not at all excessive and fully justifies the premium at which the stock had sold, namely, from 115 to 140 (pp. 156, 212, 291, 353, 354, 439).

The master excluded several parcels of land which should have been included in the lands used for stock-yards purposes. Two of them are the tracts lettered in the master's report (*d*), 8.028 acres, and (*e*), 12.122 acres, (p. 75), and are valued by him as respectively worth $41,140 and $85,000, or a total of $126,140. The land was acquired and is held for present and future stock-yards purposes, and is clearly a necessary part of the plant. As matter of fact, the two tracts are used for the dumping of manure and offal, and, if not so used, other property would have to be bought or leased for that purpose (pp. 167, 169, 193). Foster, D. J., refers, at page 872, to the omission of these parcels by the master, and intimates his view that they should have been included as a necessary part of the stock-yards plant, for he includes their value in his estimate. Under the evidence in the record, there should be no other reasonable conclusion than that these parcels should be treated as part of the property now actually used for stock-yards purposes.

The evidence shows another item which should have been included in arriving at the fair value of the capital invested and employed in the business of the stock-yards company. The master found that the stock-yards company had paid in cash, land and stock $817,944.28 in order to induce the establishment of packing plants in the immediate vicinity of the yards, and thus create a constant demand and stable market. The master's report briefly summarizes this feature of the case as follows (pp. 60, 61):

"At the date these yards were opened by the Kansas Stock Yard Company, there were no packing-houses at Kansas City, but soon thereafter a small one was established by Bigger & Company, with a daily capacity of from 100 to 150 hogs. This was followed by the erection of several beef, pork and mutton packing establishments in the immediate vicinity of the yards, with a large capacity for the slaughtering of live stock, amounting in 1896 to 894,537 cattle, 58,331 calves, 2,263,143 hogs and 685,727 sheep. Many of these establishments were secured to locate at Kansas City and in the immediate vicinity of the yards by the energetic, persistent and continued efforts of the defendant company, and of the company to whose rights it succeeded as hereinafter set forth, by the payment of large sums of money, the conveyance of valuable real estate, and the issuance and delivery of shares of its capital stock. . . . All of these companies are now actively engaged in business near the yards, except Kingan & Co. and Hollis & Co., neither of which has been in business for at least two years last past."

The question is whether this necessary expenditure ought properly and fairly to be considered in determining the amount of capital actually invested upon which a reasonable rate of interest or return may be earned. Of course, the fact that in two instances stock, which was worth above par, was issued instead of money (pp. 266, 285, 318) cannot make any difference. The stock itself could have been sold and the proceeds in money paid over. If these expenditures are not to be directly considered, at any rate they show how proper it is to value the property for stock-yards purposes. These expenditures were made in order to increase the value of the property for that particular purpose.

All the witnesses agreed that the existence of these packing plants in close proximity to the yards was the main cause of the growth and stability of the

market at Kansas City (pp. 139, 144, 174, 320, 321, 327, 329, 347, 353, 394, 399, 434, 451). The necessities of these plants create a constant demand for live stock, and without these packing houses the market would not exist. Indeed, during the year 1896, these packing plants bought one-half of all the cattle sold at the yards and four-fifths of all the hogs (pp. 139, 144). Moreover, the increase in the business of the yards has been most pronounced since the establishment of these packing plants (p. 399).

This expenditure on the part of the stock-yards company has undoubtedly created the market more than any other cause, and it has correspondingly benefited Kansas City and all the patrons of the yards. These patrons in 1896 received for their live stock $1,500,000 more than they could have realized elsewhere (pp. 74, 123), principally as the result of the establishment of packing plants at Kansas City. Reaping the benefit of this expenditure, is it now quite fair to say that the owners of live stock are not to contribute in any way to pay interest on this expenditure?

It was also shown that the stock-yards company had on hand in its business some $400,000 in cash and credits (p. 76). This was entirely thrown out by the master. There should hardly be much need of arguing the proposition that such a concern must have a reasonable amount of working capital. It is called upon to purchase supplies at wholesale, to advance freights to the railroads and otherwise constantly to disburse funds. It is pressing the stock-yards owner altogether too far to say, and it would be grossly unjust to hold, that the cash working capital which he finds necessary to carry and have on hand for use in the business and for the accommodation of the patrons of the yard is not to be considered

as any part of the capital invested upon which some return is to be expected. What paralysis would seize the business if the stock-yards company were to refuse to advance freights, etc., and compel each owner of live stock to attend personally and finance for himself!

There is another error that requires correction. The Attorney-General was not warranted in stating, in the brief filed in this court upon the original argument (p. 27), that the "capital stock issued and outstanding is admitted to be far in excess both of the amount of money actually invested in the concern and of the value of the tangible property," for no such admission was ever made, and the facts and record do not support any such statement.

The cash investments of the owners of the stock-yards in this enterprise and the present values, according to the master's basis and the concession of the Attorney-General, may also be stated here in order to dispel some misconceptions as to what the facts really are, as shown by the record.

The cash investments are:

1.	Cash investment for stock at par (record, p. 79)..... ...	$2,484,500 00
2.	Earnings invested in property and improvements instead of being distributed (p. 79).....	2,369,173 00
3.	Conceded increase of value of land as reported by master (pp. 64, 77).....	1,535,641 44
	Making a total investment of	$6,389,314 44

The present value, however, should be:

1.	Master's report of value of land now actually used for stock-yards purposes, divested of all improvements (p. 77)	$3,600,626 00
2.	Master's estimate of improvements, *after deducting for depreciation* (p. 77), about	1,480,000 00
3.	Master's estimate of property not then used for stock-yards purposes, erroneously disallowed by him (p. 76)	1,200,000 00
4.	Master's report as to actual cost of locating packing industries (p. 61)...	817,944 28
5.	Master's report as to value wagons, horses, supplies, etc., on hand (p. 77)	307,377 25
	Making a total of	$7,405,947 53

or $37,297.53 in excess of the $7,368,650 of capital stock issued and outstanding taken at par.

The actual cost of the bare or naked land used for stock-yards was $2,064,984.56 (p. 64); and the master, valuing it as bare or naked land, reported that it had increased in value to $3,600,626, or an increase of $1,535,641.44 (p. 77.) If the master had allowed for the value of the property in its present condition, having regard to its peculiar adaptability to stock-yards purposes, it cannot be doubted that he would have reported that the value of the bare land had increased to at least $5,600,000 during the long period which the stock-yards company had held it. The appellants insist that even as bare land it had increased in value much more than the master reported—at least double the increase of

$1,535,641.44 allowed by him. It will be observed that while the master reported that the main yards in Kansas (40.659 acres) had increased from a cost of $230,110.81 (p. 64) to $1,219,770 (p. 77), yet he reported that the yards in Missouri (41.708 acres) had increased only from the cost of $1,691,619.59 to $1,876,860 (pp. 64, 77).

4.

As to the stock dividends.

Between 1871 and 1897 the owners of the stock-yards property from time to time invested in the enterprise $2,484,500 in cash, and they received for their contributions an equal amount of stock at par (p. 79). All of the stock at any time sold was subscribed and paid for in cash at par (pp. 213, 215). The company also invested year after year a large part of the surplus earnings in new property or permanent improvements (pp. 213, 235–237). In other words, instead of dividing all the earnings and issuing stock or bonds for the funds to acquire new property and make necessary improvements, they invested surplus earnings. Of these surplus earnings, $2,369,173 were capitalized, and stock was issued to the stockholders at par to represent their respective distributive shares in these earnings (p. 79). The master reports and the Attorney-General suggested in his brief on the original argument that these stock dividends, were "issued to the stockholders without the payment of any money by them" (p. 4). While this is true in the letter and form, it is not true in the spirit and essence. There is absolutely no dispute that net profits of the company were invested in the purchase of additional land and in permanent improvements to the amount of at least $2,369,173, for which capital stock was issued. There can be no question, in law or common sense, that the stockholders could every year, from

the beginning and as long as the business was steadily increasing, have taken out of the business all the net profits with perfect propriety, and sold stock or bonds to procure the funds found necessary from time to time for the purchase of additional property. Instead of taking the money in dividends and then securing the necessary funds through sales of stock or bonds, the stockholders allowed the net earnings, which equitably belonged to them, to be permanently invested in the business, which was then constantly growing. If they had distributed all the net earnings in dividends and sold $2,369,173 of stock or bonds to the public, there would today be absolutely no question but that the business represented an investment of that amount. Added to the other cash contributed, it would make the total actual cash investment $4,853,673. It is confidently submitted that this court will look at the substance and not at the form of the investment, and that it will never hold that the owners of this stock-yards property are prejudiced, because, instead of dividing all net earnings and selling new stock or bonds for additional property and improvements, they saw fit to adopt the more conservative course of using the net profits for capital expenditures and representing such capital expenditures by stock.

It may also be again urged, as a prejudicial circumstance, that dividends were issued to represent the increased value of the lands. Now, if, as matter of fact, there was an increase in value, this transaction was perfectly honest and legitimate.[1] On the other hand, if there was no increase in value, the transaction was not honest or legitimate, and would constitute a most objectionable form of

[1] As one of the witnesses testified—"Well, in any business transaction, as I understand it, if you put one dollar in an enterprise or a property, and it becomes worth three, you are entitled to put that value upon it" (p. 327).

stock-watering, which no court should take into consideration in determining the true value of any property. As we have already seen, the Attorney-General admits that "this property has greatly increased in value since the organization of the stock-yards," and concedes that the increase in value was as reported by the master—namely, $1,536,031 above cost (record, pp. 64, 77; defendant's brief, p. 73). The only capital stock issued to represent increased values was $995,000 in 1884 on the organization of the new company, and $1,058,067 in 1888, making together $2,053,067, *which covers the whole period of twenty-five years, and the growth of Kansas City from a village to a great city.* Therefore, the only basis for a prejudicial suggestion is at most the difference between the increased value found by the master and the par of the stock issued, and that difference is $517,036. But there is absolutely no evidence that, when these stock dividends were declared, the actual value of the property did not more than justify the amount of stock issued. Besides, the dividends were declared in 1883 and 1888, a period of prosperity and high values; and the testimony in these suits was taken in 1897 at a period of extraordinary depression of values all over the country, and particularly in and about Kansas (record, pp. 215, 442, 445, 489).

The Attorney-General stated that the increased value of land capitalized by the issue of stock amounted in the aggregate to $2,593,067 (brief on original argument, pp. 4, 5). This is clearly an error, which has resulted from a mistake made by the master in the table prepared by him and printed in the record at page 79. The master reported, as part of the "stock dividends based upon increased value of lands," $40,000 of stock issued at par in 1879 to Fowler Brothers and $500,000

issued at par in 1893 to the Armour Packing Company for the purpose of inducing them to establish packing plants in the immediate vicinity of the yards (record, p. 61). There is no pretense that Fowler Brothers and the Armour Packing Company did not receive this stock, nor is there any doubt that it was issued as the equivalent of an equal amount in cash (*e. g.*, p. 266). It is not contended that this stock was improperly or improvidently issued or without full value received, or that the stock-yards company and the market at Kansas City have not been immeasurably benefited thereby. The propriety of the expenditure can hardly be doubted. But, in any event, whether the policy was wise or not, no court can possibly hold that these payments to third parties constitute, directly or indirectly, in any shape or form, a stock dividend distributed among the stockholders. As matter of fact, it lessened their interest in the assets.

Another branch of this feature of stock dividends should be explained. Between 1871 and 1884, the original company from time to time increased its capital stock to represent either money put in or undivided earnings invested in additional property, betterments, improvements or extensions. In December, 1883, the par value of its capital stock was $995,000, and it represented either cash put in or, what is the equivalent, earnings re-invested. In the meantime—that is to say, between 1871 and 1883—the value of the property had increased with the advance of the city itself and the increase in value of all surrounding property, so that the value of the land and improvements then actually used or retained for stock-yards purposes was at least $1,990,000, irrespective of other lands not used for that purpose and which were not then transferred.

The stock-yards company in December, 1883, deter-

mined to increase its capital stock to the true value of the property it owned and used for stock-yards purposes. It found it impossible under the laws of Kansas to further increase the capital of the existing company, and therefore a new company was organized with substantially the same name, and to this new company the old company sold its stock-yards property for $1,990,000, which was paid in new capital stock at par (pp. 283, 284). As the record establishes that this property was then worth at least that amount, there is obviously no ground for criticising or condemning the change of capital or the reorganization. *None of the witnesses called on behalf of the defense ventured to contradict the testimony on behalf of the complainants as to the value of the property in January, 1884, or as to the fact that the lands and improvements transferred to the new company were actually worth at least $1,990,000 at the date of transfer, and no evidence in the case tends in the slightest degree to impeach or lessen the effect of this direct proof* (pp. 212, 213, 217, 218, 230, 231, 283, 284). Instead of selling the property, as could easily have been done, and realizing $1,990,000, and distributing the proceeds among the stockholders, the company saw fit to reorganize and recapitalize the business, and place the par of the capital stock at what was indisputably the fair, true, honest and intrinsic value of the tangible property it represented. If the property, which then covered nearly one hundred acres, with the buildings, pens and other improvements thereon, had doubled or trebled in value by reason of the extraordinary development of the city and of the market, the owners were by every rule of justice and common fairness entitled to the benefit of that increase. They could, of course, have been taxed upon the increased value. They could have realized the amount for

their property by selling it. The substance of the transaction was to give the stockholders of the old company two shares of new stock for one share of old stock; and the result was the same as if the company had then sold its property for $1,990,000 in cash, and distributed the proceeds *pro rata* among the stockholders. In a word, the stockholders got $200 in stock for each existing share instead of $200 in cash. This did not in any sense constitute a watering of stock. Of course, it is not claimed on behalf of the complainants that the fact that a new company was organized instead of increasing the capital stock of the old company makes any substantial difference; but it is insisted that the transaction was in every aspect legitimate, for it was perfectly proper and honest, legally and morally, to increase the stock capitalization if the valuation and earning capacity clearly justified it. At any rate, there is absolutely no allegation or proof challenging the entire integrity and propriety of this transaction, and it must be accepted as honest until the contrary be proved.

5.

As to the feed charges.

The predecessor of the present Attorney-General of Kansas insisted below that the legislature of Kansas might properly regulate the yardage and feeding charges of the defendant company in Missouri, because it was a Kansas corporation, and that position was taken in the answer (p. 898). Attorney-General Boyle clearly intended to enforce the law as having an extra-territorial scope and effect and as applying to interstate commerce. *The bond in the penalty of $200,000 exacted from the stock-yards company expressly covers yardage and feeding in Missouri* (pp. 961–962). The concession made by the present Attorney-General (brief on original argu-

ment, p. 19), that "there is nothing in the act which indicates any intention that it shall operate outside of the state," would seem to remove that feature from the case, for the court, in view of this admission, will not further consider, it is assumed, whether the act has any force or effect in Missouri. But as the court below exacted a bond covering yardage and feeding charges made by the defendant company in Missouri, this court must reverse the decree in that respect, for otherwise the penalty of the bond would be enforcible and the decree would be *res adjudicata* upon that point.

The facts on this branch of the case may be briefly stated. The feed is ordered, sold and paid for in the Missouri yards (record, pp. 65, 119). The average amount of hay fed to cattle is 5 pounds per head, for which the charge is 5 cents, and this covers not only the hay itself but the service of feeding, spreading on the floor, etc., etc. The average charge for feed per hog is 1½ cents, and the average charge for sheep is less than ½ of one cent per head (pp. 110, 113, 114, 141, 367, 368, 387). The main cost of the service is in the labor, for there will be 20 separate deliveries to one ton of hay (pp. 109, 113, 118, 142), and it will be fed to 400 cattle (pp. 366–367). Thus, if we take a ton of hay as a basis, we find that it is bought in large quantities and of the best quality and costs about $9 a ton including necessary insurance, etc. (p. 143). It is sold for $20 a ton, no matter what it costs, although the company has had to pay as high as $15 and $24 a ton (p. 143). It is difficult to determine the cost of the labor of delivering and feeding. It probably costs the stock-yards company more than any other service rendered (pp. 109, 118). It certainly costs at least 40 per cent. of the gross price

realized (pp. 124, 142, 199, 235, 240). If we allow to this department its fair share of depreciation or improvements and cost of barns, wagons, etc., the cost of labor and maintenance is fully 50 per cent. Therefore, the ton, which is retailed in 20 separate lots and fed to an average of 400 cattle, realizes $20, made up as follows:

(*a*) Cost at wholesale and insurance	$9 00
(*b*) Labor at least 40 per cent. (p. 235) or	8 00
(*c*) Leaving a profit of less than 20 per cent. or	3 00
	$20 00

to cover the cost of maintenance and the fair proportion which this department should bear of the investment.

But, if we charge against the feed department its fair share of the cost of operation, maintenance and depreciation—say, 50 per cent. of gross receipts—we shall have the result as follows:

(*a*) Cost at wholesale and insurance	$9 00
(*b*) Labor, etc., 50 per cent	10 00
(*c*) Leaving the profit per ton, for feeding 400 cattle, only	1 00
	$20 00

Now, a statute regulating the charges of an innkeeper might attempt to prescribe that all food should be sold at not to exceed one hundred per cent. over the market value. It would sound fair and plausible: one hundred per cent. above *cost!* Yet it might be ruinous. It might represent no profit whatever. It would be shown that eggs, potatoes, fruits and meats are all bought at wholesale and sold for many times their original cost. Thus, eggs that may cost twelve cents a dozen at wholesale might be served by the innkeeper at five cents apiece—an increase of 400 per cent. over cost; but it would at once be recognized that this was not profit, and that after deducting labor and cost of operation, maintenance, rent, etc., probably little or no profit would be made. We are not

re to ask a *profit* of 100 per cent. above cost of material
d labor. Far from it. The legislation is that no matter
at the *cost* may be—including original cost and cost
insurance, maintenance of barns, etc., labor in keeping
d delivery and feeding—the price shall be arbitrarily
ed at 100 per cent. above the market of the day pre-
ding, irrespective of the amount of profit or loss which
at price may involve to the company.

The Attorney-General contended that the statute
tended to limit the price to 100 per cent. above the
tail price of the market (brief on original argument,
22); but the retail price in such small lots as five
nts' worth or even one dollar's worth of hay was
t shown, and could not be shown, as the court will
adily perceive by referring to the testimony adduced on
half of the defense. Of course, there is no such retail
siness in the small lots referred to except in stables and
ttle yards. Moreover, the market price *at retail* was not
own by competent evidence, and consequently there
as absolutely no excuse for mulcting the stock-yards com-
ny and exacting the bond (p. 961). It was the price at
holesale by the ton that was the basis of the master's
port (pp. 141, 143). Had some witness engaged in
e business of feeding cattle or other live stock been
lled, and it had been shown that he was qualified by
perience, his testimony would have been of practical aid;
t none such testified. The business of a stock-yards
essentially different from a feed store (pp. 141, 142);
is in the nature of a stable or cattle-yard. A man who
ys at wholesale can readily sell by the ton at a profit of
dollar or two, provided he can sell in bulk and does
t have to deliver it; but if he has to make for each
n 20 separate deliveries and feed 400 head of cattle,

it would be unreasonable to expect him to sell a ton of hay for even double the cost at wholesale for large lots. It is the universal experience in all businesses that the cost of labor greatly and necessarily increases the price at retail over the price at wholesale. If, to repeat, the legislation gave the stock-yards 100 per cent., or 50 per cent., or 33⅓ per cent. clear profit on its feed, estimated fairly on original cost and labor, an entirely different question would be presented. But it does not do so. It arbitrarily prescribes that no matter what the actual cost of the hay and labor may be, and no matter what the cost of the service of delivery and feeding, the charge shall not exceed what other dealers not similarly situated may sell for under essentially different conditions.

Three witnesses were called by Attorney-General Boyle to prove the market value of feed, namely, Spellman, Fish and Tyler (pp. 768, 770, 773). Spellman testified on cross-examination that there was no market price for such small lots as the stock-yards company sells, and that "each man makes his own price" (p. 770). Fish said that although he would sell five cents' worth if requested, yet he "would not deliver such a small quantity as that," and that it would not pay "to send my wagon out with it" (pp. 772, 773). Tyler simply testified as a wholesale dealer, and not as a retailer, and the prices he quoted of $9 per ton for hay did not include delivery (p. 774).

Moreover, there is absolutely no compulsion about this feeding. There is no suggestion in the record that the feeding in cars is not just as convenient for those who object to the charges of the stock-yards company, and as humane to the live stock (pp. 115, 117, 322, 397, 788, 795). Indeed, one of the Attorney-General's witnesses, Peck, testified that it was his practice to feed in the cars

(p. 788). The reason why most of the live stock owners prefer to feed at the yards is undoubtedly because of the extremely reasonable charge per head of cattle, etc., made by the stock-yards company, and because they could not themselves, or at any yard or stable in Kansas City, obtain the same service for anything like the same low charge. Indeed, the testimony shows that the large buyers for the packing plants and others find it convenient and profitable to feed at the stock-yards until they need the live stock for slaughter or shipment (p. 424).

In view of this proof, it must be evident that the customary charges for feed are not in themselves unreasonable and that the statutory provision is arbitrary and unreasonable. Moreover, it cannot be fair play to have the master and court below find against the stock-yards company on the basis of market prices at *wholesale* and yet have that finding and the bond exacted thereon upheld in this court by the plea that after all the statute only meant the market prices at *retail* (Attorney-General's brief on original argument, p. 22).

The questions as to interstate commerce and as to how far this act may constitute a regulation of commerce are discussed in the principal brief filed on the original argument. These questions are of great and growing importance, but as the case can be decided on the merits upon the assumption that all the business was confined to Kansas—for that is a convenient test as to the reasonableness of the statutory rates—and as the Attorney-General of Kansas now concedes that the operation of the act is to be confined wholly within that state, the question of interstate commerce may be reserved for some other case squarely and necessarily presenting it for decision.

POINTS OF LAW.

The discussion of the law may be divided under the following points:

I. The unconstitutionality of the act as constituting class legislation (pp. 52-59;)

II. The nature of the power to regulate charges (pp. 59-67);

III. The value in themselves of the services rendered and the reasonableness of the customary charge collected by the stock-yards company (pp. 67-88);

IV. The effect of the statute on the gross and net earnings of the stock-yards company (pp. 88-104);

V. The fair present value of the stock-yards property (pp. 104-124).

I.

THE UNCONSTITUTIONALITY OF THE ACT AS CONSTITUTING CLASS LEGISLATION.

In the case at bar, the court is called upon for the first time to adjudicate what elements are to be considered in determining the compensation that an owner of private property, which is claimed to have become impressed with a public interest, is entitled to charge for the use of his property, when such owner performs no public function and enjoys or exercises no special franchise or privilege from the state. In all the previous cases affecting any private business, such as warehouses and elevators, the controversy was as to the existence of the power to regulate at all, and in no way touched upon the reasonableness of the rates prescribed. *Munn* v. *Illinois*, 94 U. S. 113; *Budd* v. *New York*, 143 U. S. 517; *Brass* v. *Stoeser*, 153 U. S. 391. Up to this time, every case involving any inquiry as to the reasonableness of statutory rates has affected public corporations, such as railroad, turnpike and water companies, which enjoy valuable franchises and perform functions of the state, and whose right to exact tolls from the public is derived ex-

pressly or impliedly from legislative grant. *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362; *Covington, &c., Turnpike Co.* v. *Sandford*, 164 U. S. 578; *Smyth* v. *Ames*, 169 U. S. 466; *San Diego Land Company* v. *National City*, 174 U. S. 739; *Wisconsin, M., &c., R. R. Co.* v. *Jacobson*, unreported, decided December 13, 1900.

The court is also called upon in the case at bar to decide for the first time whether the doctrine of *Munn* v. *Illinois* shall be extended so that a legislature may, in the case of any business claimed to have become impressed with a public interest, regulate the charges of large dealers, and leave small dealers in substantially the same business free from regulation. In *Munn* v. *Illinois*, *Budd* v. *New York* and *Brass* v. *Stoeser*, the regulation applied to all alike in the same locality, whether owners of large or small warehouses or elevators, and there was absolutely no discrimination because of the extent or volume of business done or the amount of property owned. In a word, under the statutes involved in those cases, there was no class distinction between large and small traders, rich and poor. In the case at bar, all small yards, feeding stations and cattle stables are not regulated or affected. The testimony shows that there are at least two other yards in Kansas—namely, at Wichita (record, pp. 173, 326, 798) and at Jamestown (p. 788)—and, for all that appears, there are numerous feeding stations and cattle stables all over the state. The legislature, of course, had some purpose in wording its enactment so as to exempt all small yards from its operation. The Attorney-General contended in the brief filed on the original argument that, for all that appears, the Kansas City stock-yard is the only stock-yard in the state. If that had been the fact, the legislature would never have worded its enact-

ment in the peculiar way it did, *and the Attorney-General would have shown the fact.* But it is not the fact, as shown by the testimony of defendant's witnesses Peck and Jaquins (pp. 788, 798). On its face, this act exempts and was intended to exempt small yards and small dealers in feed. And "it is a pure, bald and unmixed power of discrimination in favor of" those persons who are engaged in a similar business of yarding and feeding cattle to a smaller extent than at the Kansas City yards. *Lake Shore &c. Railway Co.* v. *Smith*, 173 U. S., 684, 698.

In order that there may be no question in the mind of this court in regard to the proposition urged by the appellants that it was the deliberate purpose of the Kansas legislature to single out large stock-yards and select them as a class for regulation solely because of the volume of business done, it will save much time and discussion to quote from the brief of the Attorney-General of Kansas submitted on the original argument in this court. Thus, on page 12, in answering the contention of the appellants that the Kansas statute conflicted with the equality clause of the Fourteenth Amendment and discriminated against the defendant company, the Attorney-General said:

> "A mere reading of the act should constitute sufficient answer to the objections made. The law is framed upon general terms so as to include all stock-yards in which a certain volume of business is transacted, and will hereafter include other stock-yards in which the business shall grow to the volume indicated. *The legislature has, by this act, classified the stock-yards of the state into two classes*, and has adopted the most natural and reasonable basis for such purposes that could be used, namely, the volume of business done. The reason for this is obvious; the stock-yards doing a large volume of business are necessarily more of monopolies than those doing a smaller business. The public has

greater interest in the business of large stock-yards than it has in the business of smaller ones. The stock-yards of Kansas City furnish the most important feeding-cattle market and one of the largest general markets in the United States. They are the habitual resort of purchasers of cattle, calves, sheep, and hogs. They are situated at the gateway of the commerce of a vast portion of the United States, and as a consequence great numbers of shippers of stock are compelled to use these yards, and the business done there is naturally and properly the subject of legislative control. If there be other yards within the state of Kansas doing a business of such a magnitude and nature as the Kansas City yards, those yards come within the provisions of the law in question. If there be no other yards within the state of Kansas doing such business, then the Kansas City stock-yards are the sole representative of their class in the state. The fact that there is but one plant which is properly the subject of legislative control does not deprive the legislature of the power to exercise its authority with regard thereto.

"Another reason why the classification should be based upon the volume of business done is, that rates which are reasonable and proper and furnish a sufficient return upon the capital invested can very properly be made lower and different in a plant where the volume of business is large, while in a smaller plant doing a smaller volume of business higher rates may be necessary in order to afford adequate returns. It would not be proper to base a classification of stock-yards upon the population of the towns where they might be located, as the business done bears but a trifling relation to the population surrounding the yards."

It is not a proper classification of warehouses or elevators or stock-yards or other private businesses to divide them according to their size or value or volume of business, either for purposes of taxation or for the regulation of their charges. The equality clause of the Fourteenth Amendment will not permit, under the guise

of classification, any such arbitrary division into classes. All persons and corporations are equally entitled to pursue their happiness and acquire and enjoy property; no greater burdens can be laid upon one than are laid upon others in the same calling or condition, and a law which singles out the large warehouses or elevators or stock-yards, and leaves the smaller dealers and traders untouched and unaffected, is a most vicious and dangerous form of class legislation. The decisions of this court should render this proposition so clear as not to warrant any extended discussion. If we apply to the facts now presented the principles announced in the leading cases on the equality clause, this statute must fall as obnoxious to the constitutional guaranties of liberty and property and of equal rights. *Hurtado* v. *California*, 110 U. S., 516, 556; *Barbier* v. *Connolly*, 113 U. S., 27, 31, 32; *Yick Wo* v. *Hopkins*, 118 U. S., 356, 369; *Bell's Gap Railroad Co.* v. *Pennsylvania*, 134 U. S., 232, 237; *Gulf, Colorado & Santa Fé R'y.* v. *Ellis*, 165 U. S., 150, 155, 159, 160, 165; *Allgeyer* v. *Louisiana*, 165 U. S., 578, 589; *Lake Shore, &c., Railway Co.* v. *Smith*, 173 U. S., 684, 691.

As Mr. Justice Brown said in *Lawton* v. *Steele*, 152 U. S. 133, 137:

> "To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations."

It is submitted that if a business, as matter of fact,

has become impressed with a public interest, and it is found that the common-law requirement of reasonable charges is insufficient to protect the public, and that legislation is necessary, then the only safe rule, and the only legal rule, in case the legislature does interfere to regulate, is that the regulation shall be by general law applicable to all alike—that is to say, to owners of large and small business plants, to rich and poor. This is the spirit of the Kansas constitution, which provides "that all laws of a general nature shall have a uniform operation throughout the state." [1] A legislature cannot constitutionally limit the right of the owner of a large stock-yard to charge yardage or to sell hay and other feed for such price as he can obtain and leave all other yards and stables free to obtain what they may. This is not a legitimate classification. Such a law is not equal within the true meaning of the Fourteenth Amendment. It is not allowable that large dealers in an article of live-stock food shall be regulated and all other dealers in the same commodity left free until they build up a large and paying business.

It is earnestly submitted that the doctrine of *Munn* v. *Illinois* should not be extended in either of these two important and far-reaching aspects. The doctrine of that case is at best at the parting of the ways. Its soundness has been challenged by some of the best writers and jurists of the country. It will work infinite mischief if legislatures are now told that they may select large concerns for "regulation," and create them by legislative fiat into "public operators," and leave all small dealers at liberty to pursue their trades. If this singling out of the large concerns or the rich for punishment or spoliation

[1] Constitution of Kansas, art. 2, sec. 17.

under the guise of regulation of charges is to be sanctioned, how easily and logically will it lead to similar classification for purposes of taxation! There are cases where the principle involved is so great that the private interest or concern of the particular litigant shrinks almost out of sight. This is one of those great cases and will be a landmark in our jurisprudence. Fortunate will it be for the best interests of our country and its future if this court shall now declare that the legislative power of regulation under *Munn* v. *Illinois* must be exercised by general and equal laws as long as the Federal Constitution guarantees the equal protection of the law. That guaranty should assure to every person and corporation the protection of equal laws applicable to all alike, and impartially administered without favor or discrimination. The golden rule of equality must be maintained as the absolute right of every American. And, infused through the mass of our rights and duties in every relation and condition of life, pulsating through all our interests, may it long continue to pervade, unite and invigorate our whole system of constitutional government.

Security of property rights and confidence in the impartial administration of equal laws have been the true source of our marvelous prosperity during the last three decades, which is the wonder and envy of the world. It is the principle of equality which has given us stability and immense effective force. Whatever temporary local interest or prejudice or blindness may be—whether populism or communism or collectivism—the people of Kansas and other states must inevitably realize that the disregard of the principle of equality and the restraint which it imposes is in conflict with their own vital and permanent welfare, and cannot be tolerated if we are to remain a free people

under the rule of constitutional guaranties, restraining all arbitrary and despotic exercise of the powers of government. "In this sense," if we may quote Burke, "the restraints on men, as well as their liberties, are to be reckoned among their rights."[1]

II.

The nature of the power to regulate charges.

The power of a legislature to regulate or prescribe the tolls or charges of corporations performing public functions and exercising the power of eminent domain really finds its origin and sanction in the legislative grant itself. Without a statutory grant, express or implied, no public corporation, such as a railroad, a turnpike, or a water company, could exercise the power of eminent domain, or could exact toll for the use of the public highway or the public waters. Such a power is in derogation of public and private rights. A toll may truly be termed in effect a common charge on the public. Its imposition and regulation are essentially prerogatives of the government alone. As these public corporations are created and their franchises granted primarily for the benefit of the public, they become and serve as instrumentalities of the state for the common welfare of its people and the development of its resources; and they must be subject to the governmental power and duty of control, supervision and regulation. This control is fair and just, as well to the public as to the property owner; for the charter grant always implies, if it does not recite, that the legislature has reserved the right to prescribe reasonable tolls and charges for the use of the public highways, public waters,

[1] Burke's works, "Reflections on the Revolution in France." Little, Brown & Co.'s Am. ed., iii., 310.

etc., and it may be said that this reservation is a part of the charter contract itself.

Thus, at the present term of this court, Mr. Justice Peckham has set forth the character of these public corporations in the case of *Wisconsin, M., &c., R. R. Co.* v. *Jacobson* (unreported, decided December 13, 1900), as follows:

> "Railroads have from the very outset been regarded as public highways, and the right and the duty of the government to regulate in a reasonable and proper manner the conduct and business of railroad corporations have been founded upon that fact. Constituting public highways of a most important character, the function of proper regulation by the government springs from the fact that in relation to all highways the duty of regulation is governmental in its nature. At the present day there is no denial of these propositions (*Olcott* v. *Supervisors*, 16 Wall. 678, 694; *Cherokee Nation* v. *Southern Kansas Railway Company*, 135 U. S. 641; *United States* v. *Joint Traffic Association*, 171 *Id.* 505–569, 570; *Lake Shore Railway Company* v. *Ohio*, 173 *Id.*, 285, 301).
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> "It is because they are such highways that the land upon which the rails are laid, and also that which may be necessary for the other purposes of the corporation, is said to be used for a public purpose, and on that ground the power of eminent domain which is given them is held to be a constitutional exercise of legislative authority. The right of the legislature to tax in furtherance of such use is founded upon the same considerations that the use is a public one, and therefore taxation in support of such use is valid (*Olcott* v. *Supervisors*, *supra*). The companies hold a public franchise, and governmental supervision is therefore valid. They are organized for the public interests and to subserve primarily the public good and convenience.
>
> "While this power of regulation exists, it is also to be remembered that the legislature cannot under the guise of regulation interfere with the proper conduct of the business of the railroad corporation in

matters which do not fairly belong to the domain of reasonable regulation (*Lake Shore, &c., Railway Co.* v. *Smith*, 173 U. S. 684)."

The cases which discuss the power of regulating the tolls and charges of railroad, turnpike and water companies emphasize the fact that the companies are performing public functions, that the right to exact tolls comes from the state, that there is an implied condition or reservation in the grant that the tolls shall be subject to legislative regulation, and, *e. g.*, that "it is as vital that the state should retain its control of tolls upon public highways as it is that it should not surrender or fetter its power of taxation." *Covington, &c., Turnpike Co.* v. *Sandford*, 164 U. S., 578, 587, 594. See, also, *Olcott* v. *The Supervisors*, 16 Wall. 678, 695; *Georgia Banking Co.* v. *Smith*, 128 U. S. 174, 179; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 393; *Smyth* v. *Ames*, 169 U. S. 466, 544; *Olcott* v. *Banfill*, 4 N. H. 537, 545; *Boston and Lowell Railroad Corporation* v. *Salem and Lowell Railroad Co.*, 2 Gray, 1, 29; *Camden and Amboy R. R. Co.* v. *Briggs*, 22 N. J. Law, 623, 659; *Delaware, &c., R. R. Co.* v. *Central Stock-Yard Co.*, 45 N. J. Eq. 50, 54; affirmed in 46 N. J. Eq. 280; *Erie & North-East Railroad Company* v. *Casey*, 26 Pa. St. 287, 307; *Girard Storage Co.* v. *Southwark Co.*, 105 Pa. St. 248, 251; *Stone* v. *N. J. & C. R. R. Co.*, 62 Miss. 646, 653. Even then the true scope of the power is "to prevent extortion or unreasonable or illegal exactions," as Mr. Justice Peckham said in *Lake Shore &c. Railway Co.* v. *Smith*, 173 U. S., 684, 698. It follows that, when the legislature does exercise its reserved power, the courts may well hold that only in the case of clear abuse ought the judicial branch to interfere, because such reservation is

part of the contract of incorporation and part of the consideration upon which valuable franchises and privileges have been granted and accepted.

But no such consideration exists in the case of individuals and private corporations which exercise no power of eminent domain and perform no public functions or duties. The authority of the legislature to regulate their charges—if, indeed, there be any sound basis for such interference with private property—is derived solely from the police power, and can be upheld upon no other theory. It does not spring from any grant or implied condition or contract, but is founded upon the assumption that it is the duty of the state to protect the public from extortion by those whose property is of such a character that they have the power, as it were, to make a prey of the necessities of the people. Under such circumstances, it is said, the conduct of the particular business becomes a matter of public concern and interest. But obviously the public concern is limited to the prevention of extortionate or unreasonable charges. The *Munn* case was based in great measure upon the statement of Lord Hale that every warehouseman "ought to be under a public regulation, viz., that [he] . . . take but reasonable toll" (*Munn* v. *Illinois*, 94 U. S. 113, 132), and this was recognized by Mr. Justice Blatchford in *Budd* v. *New York*, 143 U. S. 517, 536, as the basis of the *Munn* case. Therefore, if we look to the source of this whole doctrine (Hargrave's Law Tracts, p. 6), we must see that the true principle is that the power of the legislature in respect of such callings as warehousemen, etc., is not to regulate rates or tolls generally, but to subject them solely to the one regulation that they "take but reasonable toll." Beyond this, a legislature should not be permitted to step;

nd, so long as the charges of the owner of such private roperty are not unreasonable or extortionate, the people ave no grievance, no remedy is called for, and the legis- ature should not be allowed to interfere.

It is submitted that there must needs be a broad dif- erence in this matter of regulation between the public or uasi-public use of highways, waters, etc., and the use of rivate property by a class of the public for its convenience nd profit. The distinction is between a use by the people f what is essentially public property or public rights and use by the people of what is essentially private property. n the case of the public property or a public right, the overnment may control, because the use or right is pri- arily public or an instrumentality of the state, within the nction and duty of the government itself to establish, fford, perform or maintain. In the case of the private roperty, the government may not justly or properly nterfere or control at all because there is essentially no overnmental function or quality or duty. If the public ver acquire a right of interference, it is at most on the heory of self-defense and overruling necessity, and it xists only to the extent of that necessity; the remedy is mited by it, and cannot step beyond it.

Private businesses and property ought not, therefore, be placed in the same category as railroads or other ublic instrumentalities, for the ground and scope of the ght and power to regulate are not at all the same n both cases.

In the case of private property so used by the public, court should in fairness and justice recognize equities n favor of the owner which may not exist in the ase of enterprises more or less public. In this country, nder American institutions, the owner of private property

should be guaranteed in fullest measure the legitimate fruits of successful venture and labor. The power of the legislature to control or interfere with property essentially private ought not to be so extensive as in the case of property essentially public; nor ought the courts to indulge, as against the owner of private property, the same degree of presumption in upholding legislative interference or invasion as may obtain when the rates of railroad, turnpike and other public corporations are being dealt with. This is a doctrine which, it is hoped, will commend itself to the court as embodying a sound rule of public policy, as well as a just regard for the rights of property. The owners of the Kansas City Stock-Yards urge that they are entitled to a larger measure of liberty of action and freedom of contract and to a larger profit than they might be entitled to expect if their capital had been invested in a public instrumentality, and they had had the advantages of public corporations and the benefit of the power of eminent domain.

It has not yet become necessary for the courts to discuss and demarcate these two distinct and separate conditions, but the idea is recognized in *Western Union Tel. Co.* v. *Myatt*, 98 Fed. Rep. 335, 341, viz.:

> "The doctrine of governmental control of property and employments devoted to public use is particularly applicable to what are commonly termed 'public-service corporations'—such as railway and telegraph companies—although it is also applied, *though probably in a much more modified degree*, to the property of private persons, which, by reason of its use, has ceased to be *juris privati*."

In the case at bar, the court below held in effect that, though the statutory rates might seem arbitrary and unreasonable according to the ordinary tests of reasonableness, yet, unless they were *confiscatory*, relief should

be denied. Thus, in dismissing the bills of complaint, Thayer, C. J., said (82 Fed. Rep. at p. 856; record, p. 945):

> "Conceding, as we must, that the legislation complained of was radical in its nature and effect, that it reduced the company's income about fifty per cent., *and that it prevents it from realizing on the capital invested in its plant such a per cent. as is ordinarily realized on capital invested in other mercantile and business enterprises*, still the court is not prepared to hold that the statute is *confiscatory*, and that it deprives the company of its property without due process of law."

The appellants are not quarrelling with words or forms of expression. They submit that the word "confiscatory" as defining the test is altogether too ambiguous. They insist that they are entitled to reasonable compensation. If any prescribed rate which results in less than reasonable compensation be confiscatory, well and good, and the term is satisfactory; but if the term "*confiscatory*" requires the property owner to show something more than that the statutory rates are unreasonable, then it is submitted that the term is inaccurate and misleading.

Although this is the first case presenting the question as to the elements to be considered in determining the reasonableness of charges in the case of private property and concerns, nevertheless the labor of the court in previous cases affecting public corporations has elucidated the fundamental principle of justice which will guide to the truth in this discussion. The appellants invoke the protection of that principle as sufficient in this case to protect them from the effects of this class legislation, if it be held that they must submit to discriminatory legislation of this character. The principle is that the owner of property is entitled to reasonable compensation for the service rendered to the public or

to a just return upon the fair present value of the property used by the public, and that the legislature in fixing or regulating charges must do so with reference to what is just and reasonable under all the circumstances—just to the property owner as well as to the public. In applying this principle, the basis of calculation in most cases will be either the value in itself of the service rendered or the fair present value of the property used for the convenience of the public, or both together, and such other equities will be considered as may justly and rightly be given weight in each case. Therefore, if there are equities in respect of industrial enterprises which do not exist in respect of railroads, the court will give the property owner the benefit of those equities. It is also now established that, if less than a reasonable rate be prescribed by a legislature, the constitutional rights of the property owner are illegally encroached upon; and that, if he challenges the justice or reasonableness of the attempted regulation, he is entitled, as matter of unqualified constitutional right, "to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy" (Mr. Justice Blatchford in *Chicago, &c., Railway Co.* v. *Minnesota*, 134 U. S. 418, 457).

As Mr. Justice Brewer said at the last term, speaking for the court, in *Chicago, Milwaukee &c. R'y* v. *Tompkins*, 176 U. S. 167, 172:

> "The proposition that such a vast amount of property is beyond the protecting clauses of the Constitution, that the owners may be deprived of it by the arbitrary enactment of any legislature, state or nation, without any right of appeal to the courts, is one

which cannot for a moment be tolerated. Difficult as are the questions involved in these cases, burdensome as the labor is which they cast upon the courts, no tribunal can hesitate to respond to the duty of inquiry and protection cast upon it by the Constitution. *Railroad Commission cases*, 116 U. S. 307; *Dow* v. *Beidelman*, 125 U. S. 680; *Georgia Railroad & Banking Co.* v. *Smith*, 128 U. S. 174; *Chicago, Milwaukee & St. Paul Railway* v. *Minnesota*, 134 U. S. 418; *Chicago & Grand Trunk Railway* v. *Wellman*, 143 U. S. 339; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362; *St. Louis & San Francisco Railway* v. *Gill*, 156 U. S. 649; *Covington, &c., Turnpike Co.* v. *Sandford*, 164 U. S. 578; *Smyth* v. *Ames*, 169 U. S. 466."

In the light of these principles, the particular features presented in the present controversy will now be discussed.

III.

THE VALUE IN THEMSELVES OF THE SERVICES RENDERED AND THE REASONABLENESS OF THE CUSTOMARY CHARGE COLLECTED BY THE STOCKYARDS COMPANY.

The element of the value in themselves of the services rendered to the class of the public using the yards for their convenience and pecuniary profit as well as of the reasonableness of the customary charges was entirely disregarded in the court below, and it was apparently assumed that the only basis of computation should be the value of the property used by the public. In neither the master's report nor in the opinions delivered by Foster, D. J., and Thayer, C. J., will there be found any discussion or finding as to the value of the service rendered to the owners or shippers of cattle and other live stock, although that question was presented by the evidence and certain findings relating thereto were reported by the master. All that the master finds is that the charges are substantially the same as those collected in other yards, and that the

price realized by live-stock owners at Kansas City is far in excess of the prices obtainable in the Chicago market (p. 74). Yet it is now well settled that the fair value in themselves of the services rendered to the public must be taken into consideration in determining judicially the reasonableness of the charges made. *San Diego Land Company* v. *National City*, 174 U. S. 739, 757.

The common law, before the legislature of Kansas saw fit to interfere on behalf of the class using the yards, required the charges to be reasonable if the business were impressed with a public interest. These statutes interfering for the purpose of regulating charges or rates are only sustained because at common law the rates had to be reasonable. The established common law rule is itself in effect a regulation of reasonable charges. *Munn* v. *Illinois*, 94 U. S. 113, 134. It has never been held in any case that the legislative fiat could impress a business with a public interest if the public interest did not already exist. Of course, if the business of "yarding, driving, feeding and watering" was not already impressed with a public use, there was absolutely no shadow of legal right to interfere and regulate the rates. Now, it was contended on the hearing that the evidence of customary charges in the past was immaterial, and it was so ruled by the master (record, p. 107; see also p. 127). It should, however, have been recognized that the common law regulating the charges in the past imposed the restriction that they should be reasonable, and that, hence, the evidence of the customary charge was of great weight, if not of almost controlling effect, in view of the fact that this customary charge has been in effect for a quarter of a century. Evidence of the customary charge is, of course, of no weight if we adopt the view of the master and the Attorney-General,

that heretofore the stock-yards company could at common law exact or extort unreasonable charges as it saw fit. In the absence of any proof of a wrong or hardship to a single person using these yards, the Attorney-General nevertheless closed his supplemental brief on the original hearing with the statement (pp. 17–18) that the statutory rates were "only a wholesome restriction upon a business impressed with a public use and upon a corporation which has been guilty of great extortion in the past." Now, there was no excuse for such a statement. There is no proof of any extortion in the past. Nor was there any excuse for stating in this supplemental brief (p. 8) that the "Kansas farmer" had to pay his commission dealer ten dollars per car and also the charges of the railroad. Such pleas *ad misericordiam* cannot affect this court. Was it possibly the notion that the supposed or pretended wrongs of the "Kansas farmer" at the hands of the commission dealers or railroads would prompt this court to punish the stock-yards company? If not, why were these utterly immaterial suggestions made?

The only true basis for the regulation of compensation, in the majority of cases affecting private property, must be the reasonable value of the service actually rendered, and not the return upon the money invested in the particular business or the value of the property. This element of the value of the service itself will, as a general rule, be found to furnish the simplest and fairest standard, approximately just to the public and to the property owner; and it will involve less difficulty and embarrassment to the courts than any other rule. The appellants also submit that the customary stock-yards charges ought to be presumably reasonable in view of their long continuance and general currency and of the settled rule at common law that such

charges had to be reasonable. Of course, if in the case at bar stock-yards were not heretofore subject to the operation and limitation of this common law rule, because not impressed with a so-called public interest, then the legislature had no power to interfere with private property and a private business.

If, for example, there were two stock-yards in Kansas, one whose plant was worth $5,000,000 because occupying valuable city property, and another whose plant was worth only $1,000,000, because occupying outlying property, could the "reasonable" charge of one be five times the charge of the other for the same service? Let us suppose that the Kansas City Stock-Yards were now about to be started for the first time, with a plant costing $5,000,000, without the adjoining packing houses, and with receipts at the beginning of only 167,000 head of live stock, as in 1871, or only 1,979,000 head as in 1883, instead of 5,471,000 head as in 1896, and that the company had the prospect of many years of risk, labor, expenditure and waiting before a large or paying business at customary rates could possibly be established. Would it not seem unreasonable for the company to charge one dollar a head upon cattle when all other yards charged twenty-five cents for the same service? Yet the excessive charge of one dollar would be necessary to pay even operating expenses. It would, however, be legally unreasonable and unjustifiable and extortionate, because it would be excessive having regard to the *value of the service*, determined in great measure by the fact that in all other stock-yards in the United States the charge was only twenty-five cents for exactly the same service under substantially similar conditions, and this had been the customary charge up to that time. The courts would say that those who

invested in such an enterprise would have to take the risk and loss consequent upon the delay necessary to build up a sufficient trade to make the enterprise fairly remunerative under reasonable and customary charges. They would say that the owner must now bear the loss because, if successful in establishing a large market and trade, he would reap the corresponding profit. That this would be the law ought to be self-evident. Would it be fair and just to permit the legislature, as soon as success was assured, to step in and take away this profit merely because a certain class of the public want to reduce profits?

Or, to put it conversely, we may suppose that the business of the stock-yards company decreases one-half by reason of the establishment of competitive yards in or adjacent to Kansas City, or in other localities perhaps better suited to meet changed business conditions. In such a case, the expense of operation would continue the same, and it would be necessary for the stock-yards to double or treble its charge in order to create a fair return upon the reasonable value of the property. But surely the company could not, simply to make up the decrease in receipts and loss of trade, increase its charge above the customary charge of other yards and the reasonable value of the service.

The very large tract of land, more than 125 acres, now used by the company for stock-yards purposes, may in the future double or treble in value. The present value of the land, surrounded as it is by a great city becoming more and more populous, may increase many-fold. A fair return upon the increased value of the property might require a great increase in the charges. An increase of $1,000 per lot would add over $1,250,000 to the value of the property, an increase of $5,000 per lot would add

$7,500,000 to the actual value. Would a court hold that, merely because the property had thus increased in value, the stock-yards company could increase the customary charge for the service rendered? The court would say, as was said in *Munn* v. *Illinois*, that, if the property became so valuable, the owner might "withdraw his grant by discontinuing the use; but, so long as he maintained the use, he must submit" to the requirement of reasonable charges. A just decision would then be that the primary consideration was not what the owner of the stock-yards should earn on the present value of his investment, but rather the reasonableness in itself of the customary charge irrespective of the result upon net earnings. *Covington &c. Turnpike Co.* v. *Sandford*, 164 U. S. 578, 596.

A large proportion of the yardage charge is for personal services, as distinguished from and in addition to the use of physical property, to wit: the labor incident to the handling, distribution, care, driving, weighing, watering and delivering live stock consigned to these yards. It was the purpose of the Legislature not only to regulate the "yarding," but, as the statute itself says, the "driving, watering and weighing of stock," and to prescribe an arbitrary charge for all these personal services as well as for the use of property. A fair return on the property or capital invested does not embrace compensation for these additional personal services, which, ordinarily, the owner of live stock would have to perform for himself. The value of the property or capital invested cannot, therefore, be the sole factor in determining the reasonableness of rates in such a case, if, indeed, it affords an element in the determination of this question in any aspect, or assists at all in solving it.

These considerations should persuade that the contention of the appellants is sound, that the customary

charges are reasonable in themselves, as evidenced by similar charges for similar services in competitive markets, and that so long as the stock-yards company continues to make the customary charge, the public is not injured and the legislature cannot interfere.

The finding of the master is that the charges of the Kansas City Stock-Yards are identical or substantially the same as at twelve other yards, comprising all the large stock-yards of the country (p. 64). The proof is that there is no agreement among these yards in regard to charges and that there is keen competition among them. Of course, in the face of this proof, it cannot be reasonably suggested that the identity or similarity of charges is of itself sufficient to justify the suspicion that there must, of necessity, be some agreement. Take, for example, the familiar case of street railroads. As is well known, the fare in almost every city of the country is five cents. This is so, in many instances, by statutory provision, but also frequently without statutory provision or under statutes authorizing more than five cents. Would it not be preposterous to hold that because of the similarity of charge there must be an understanding or a combination among the street railroad companies fixing this charge? The fact simply is that we find a consensus of opinion as to the value of the service; the service rendered is similar in its nature in every state; the cost of rendering the service is approximately the same; the value of the service to those who ride is about the same in different localities. Under such circumstances, if the legislature should reduce to three cents (40 per cent.) the fare of a street railroad company that had been built originally on private property and which had not exercised any particular

franchise such as the power of eminent domain, would it not be proper for the street railroad company to show that the customary charge in other cities was five cents; and, in the absence of all proof to the contrary, would not such testimony be most persuasive in determining the reasonableness of the charge of five cents? On the other hand, if a street railroad company, which had been charging five cents, should increase its charge 40 per cent., or to seven cents, for the same ride, and in judicial proceedings it was sought to restrain it from so doing, on the ground that the increase of charge was unreasonable, would not proof of the customary charge in the past by that company and of the customary charge in other places for a similar service under substantially like conditions be most persuasive evidence in favor of the people using the street cars in the absence of any proof justifying the increase? Other instances observable in everyday life will readily suggest themselves, but it is unnecessary to go into detail. There is, therefore, nothing in the fact of the identity of charge among the thirteen large competing stock-yards of the country tending to suggest or establish any combination whatever.

It is submitted that the proof that the charge exacted by a carrier or warehouseman or innkeeper or stock-yards is the customary rate during many years for similar services under like conditions, should establish the reasonableness of such charge as matter of law *in the absence of all evidence to the contrary.* Evidence of the customary charge has been recognized from time immemorial as a proper basis for determining this question. In all other relations it is the basis of judicial decision: the value of services or property is always established in court by proof of customary charges. *Kock* v. *Emmerling*,

22 How. 69, 74; *Erben* v. *Lorillard*, 2 Keyes (N.Y.) 567, 572. It is the safest basis in the long run, particularly when it appears that the result is a profit not at all above what owners of other industrial property receive upon their investments.

In Gunning on Law of Tolls, the author says (pp. 61, 62):

> "It only remains in this place to consider what is a reasonable toll; and on this subject the books are singularly silent, the reports containing very few cases or *dicta* upon the point, and the text writers not laying down any general rule (and perhaps none can be laid down) respecting it. With regard to tolls due by prescription, and indeed in all cases in which they have been taken for a great length of time, the sum which has been in fact uniformly taken would, in all probability, be deemed a reasonable toll; unless it were *manifestly* disproportioned to the tollable article, or to the benefit which the buyer and seller derived from the privilege of using the fair or market.
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> Long usage and acquiescence in one uniform payment for toll, is undoubtedly cogent evidence that it is reasonable.[1] . . . In an early case,[2] the corporation of Newcastle, as owners of the port there, claimed fivepence a chaldron on all coals exported. On a special verdict, it was contended that this was an unreasonable toll, the value of a chaldron of coals being only four shillings; but Lord Holt, C. J., said that as the value of the coal was not stated in the verdict, the Court could not intend that it was unreasonable."

In the case of the *Duke of Bedford* v. *Emmett*, (King's Bench, 1820), 3 B. & Ald. 366, it was held that the owner of a market might recover the tolls that were usually paid in any part of said market "if the usage has established a particular payment in any part."

In *Wright* v. *Bruister* (King's Bench, 1832), 4 Barn.

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[1] *Heddey* v. *Welhouse*, Cro. Eliz. 559.

[2] *Vinkerstone* v. *Ebden*, 1 Lord Raym. 384; 1 Salk 248; 5 Mod. 356; Carth. 357.

& Adol. 116, 117, involving the claim of a prescriptive right to take tolls of the market of Bishop Stortford, Parke, J., said that, as the jury had found that the toll was received in point of fact and that it had been received for a great length of time, the *onus* of showing that the toll was unreasonable was on the defendant, that the defendant had not shown this fact, and that the court, looking to the value of the commodity in respect of the sale for which the toll was received and the amount of toll itself, could not take upon itself to say that it was unreasonable, particularly in view of the case of *Heddey* v. *Welhouse*, Cro. Eliz. 559, where it was said that a penny, or even two pence, was a reasonable toll on the sale of a beast in a market. Taunton, J., said that the court could not say that a penny for toll on the sale of a pig was unreasonable in point of law; and Mr. Justice Patteson being of the same opinion, the rule was refused.

In *Shephard* v. *Payne* (1862), 12 C. B. N. S., 414, 431, Willes, J., said:

> "A fee need not be of a fixed and ascertained, but may be of a reasonable amount; and, exercising the power conferred upon us by the case, to draw inferences of fact, we may conclude, that, if the claim can be sustained in point of law, it was in fact for a reasonable fee. If so, then, looking to the amount established for similar services by other officers, and remembering what fees have been paid and received within the memory of us all in the Courts of Westminster Hall and at the Assizes, we think there can be little doubt that the fees in question, so far as amount is concerned, are in fact reasonable."

In *L. E. and St. L. R. R. Co.* v. *Wilson*, 119 Ind. 352, 358, the court said:

> "The law makes it the duty of every common carrier to receive and carry all goods, . . . and authorizes a reasonable reward to be charged for the service. The amount to be paid is, in a measure,

subject to the agreement of the parties; but, when the amount is not fixed by contract, the law implies that the carrier shall have a reasonable reward, *which is to be ascertained by the amount commonly, or customarily, paid for other like services. Johnson* v. *Pensacola, etc., R. R. Co.*, 16 Florida, 623; Angell Carriers, section 392; Lawson Contracts of Carriers, section 125."

In *Hopper* v. *Chicago, etc., R. R. Co.*, 91 Iowa, 639, it was held that evidence of charges by other companies for similar services might be admissible if the conditions were shown to be substantially the same. See, also, *Johnson* v. *Pensacola, etc., R. R. Co.*, 16 Florida, 623.

Speaking of the duty of common carriers at common law, Bronson, J., in *Cole* v. *Goodwin*, 19 Wend. 251, 261, said:

"It is agreed by all the books, that while he enjoys the privileges of a common carrier, there are certain duties pertaining to that office which he cannot escape in any form. In the first place, he is bound to receive passengers and goods, if he have room, and carry them for a reasonable reward, *which may be set down as the accustomed reward for like services.*"

Chancellor Kent also said of carriers (2 Com. 599):

"As they hold themselves to the world as common carriers for a reasonable compensation, they assume to do, and are bound to do, what is required of them in the course of their employment, if they have the requisite convenience to carry, and are offered a reasonable or *customary* price."

As bearing upon the view that the true test should be the value of the service in itself, reference may be made to the language of Mr. Justice Bradley in *Transportation Co.* v. *Parkersburg*, 107 U. S. 691, 699, viz.:

"It is also obvious that since a wharf is property, and wharfage is a charge or rent for its temporary use, the question whether the owner derives more or less revenue from it, or whether more or less than

the cost of building and maintaining it, or what disposition he makes of such revenue, can in no way concern those who make use of the wharf and are required to pay the regular charges therefor; provided, always, that the charges are reasonable and not exorbitant." Quoted with approval in *Ouachita Packet Co.* v. *Aiken*, 121 U. S. 444, 449.

And in *Canada Southern Railway Co.* v. *International Bridge Company*, 8 App. Cas. 723, 731, the English rule is vigorously expressed as follows by Lord Chancellor Selborne:

"It certainly appears to their Lordships that the principle must be, when reasonableness comes in question, not what profit it may be reasonable for a company to make, but what it is reasonable to charge to the person who is charged. That is the only thing he is concerned with. They do not say that the case may not be imagined of the results to a company being so enormously disproportionate to the money laid out upon the undertaking as to make that of itself possibly some evidence that the charge is unreasonable, with reference to the person against whom it is charged. But that is merely imaginary. Here we have got a perfectly reasonable scale of charges in everything which is to be regarded as material to the person against whom the charge is made. One of their Lordships asked counsel at the bar to point out which of these charges were unreasonable. It was not found possible to do so. In point of fact, every one of them seems to be, when examined with reference to the service rendered and the benefit to the person receiving that service, perfectly unexceptionable, according to any standard of reasonableness which can be suggested. That being so, it seems to their Lordships that it would be a very extraordinary thing indeed, unless the legislature had expressly said so, to hold that the persons using the bridge could claim a right to take the whole accounts of the company, to dissect their capital account, and to dissect their income account, to allow this item and disallow that, and, after manipulating the accounts in their own

way, to ask a court to say that the persons who have projected such an undertaking as this, who have encountered all the original risks of executing it, who are still subject to the risks which from natural and other causes every such undertaking is subject to, and who may possibly, as in the case alluded to by the learned judge in the court below, the case of the Tay Bridge, have the whole thing swept away in a moment, are to be regarded as making unreasonable charges, not because it is otherwise than fair for the railway company using the bridge to pay those charges, but because the bridge company gets a dividend which is alleged to amount, at the utmost, to 15 per cent. Their Lordships can hardly characterize that argument as anything less than preposterous."

Before the passage of the act of March 3, 1897, the legal right of the owner of stock-yards was clearly to receive a reasonable sum for any service rendered, even though the property had become impressed with a public interest. This right, whether we call it the liberty of the citizen or a property right, was of incalculable value. It assured him, under the shield of the Federal Constitution, the legitimate fruits of his labor and capital, and subjected him only to the risks of all commercial ventures. He cannot be deprived of that right, nor can its beneficial enjoyment be substantially impaired by legislation, of which the only legitimate object should be the prescribing of reasonable charges. Whether or not we regard the legislative function as embracing the power to prescribe reasonable rates or to prevent unreasonable, extortionate and arbitrary charges—whatever language we employ—the substance of the right of the citizen must remain inviolable and protected against impairment. That is the essence of the American system of constitutional guaranties. It is also interesting to note here that there is no provision of the Kansas constitution which expressly protects the

liberty or property of citizens from impairment or encroachment. There is no provision requiring due process of law, found in almost every other state constitution. The Fourteenth Amendment alone seems to afford protection in that state against arbitrary or confiscatory legislation.

Now, the matter in dispute in the case at bar is the reasonableness of the charge fixed by the legislature; and we may confidently assume that that is a judicial question and that the controversy is to be determined after judicial investigation, "under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy."

A mere legislative enactment, in such a case as we are considering, cannot make that reasonable which without the enactment would not be deemed reasonable according to the ordinary rules of courts of justice. This court has not intended to formulate any doctrine which would give such a weight to a legislative enactment as would, by way of presumption or otherwise, substantially impair the personal liberty or property rights of the citizen. If the charge of the owner of a stock-yard or warehouse or elevator is reasonable, having due regard to the market value of the service rendered and the customary charge elsewhere, it cannot be made unreasonable simply because the legislature, acting on behalf of the class using the property for its convenience and profit, has seen fit to attempt to reduce the charge nearly one-half, for the special benefit of that class. The power to prescribe what shall *prima facie* be deemed a reasonable charge in such a case as is before the court may be within the domain of legislative interference as a matter of evidence or court prac-

tice; but more than that is "without its operative effect," to borrow the phrase of *Munn* v. *Illinois*. Neither the owner of cattle nor the proprietor of a stock-yard or cattle exchange or stable can be concluded, or his rights materially affected or impaired, by a mere legislative enactment. *Louisville & N. R. Co.* v. *Railroad Commission of Tennessee*, 19 Fed. Rep. 679, 695; see, also, discussion in *Vanhorne's Lessee* v. *Dorrance*, 2 Dallas, 304, 312; *Monongahela Navigat'n Co.* v. *United States*, 148 U. S. 312, 327; *People* v. *Cannon*, 139 N.Y. 32, 43. Otherwise, a matter properly of judicial cognizance would find itself practically prejudged and determined by the legislature, which would act both as legislator and as judge.

Let us consider and test the question of reasonableness in two practical aspects. The owner of the stock-yards, there being no legislation, sues to recover a charge of twenty-five cents per head of cattle. The defense under the common law is that the business is impressed with a public interest, that the charge is unreasonable, and that fifteen cents is enough. It is shown, as was shown by the case at bar, that twenty-five cents has been the rate of charge for many years, that it is the rate for similar services at all other stock-yards, that experts, familiar with the business and fully qualified, testify that the charge is reasonable and fair in view of the service actually rendered, that an immense capital is invested and at hazard in the accommodations furnished, that a market and demand have been created at the cost and by the efforts of the owner of the stock-yards, that, by reason of these conditions and the artificial demand thereby created, the shipper realizes for his cattle more than he would get anywhere else, that the increased price thus obtained is very much

more than sufficient to pay all charges for yardage and feeding, that no yardage is charged unless a satisfactory sale is made, that the owner of the stock-yards is responsible as insurer and renders many services in driving, taking care of the cattle, billing, guaranteeing numbers and weights, shipping, etc., and that the whole charge for yardage and for the responsibility and labor in taking care of the cattle, including driving, putting in pens, transferring, facilitating advantageous sale, watering, weighing, guaranteeing, etc., was only about one-half of one per cent. of the price realized for the cattle (p. 147). And, as here, no other evidence is offered. Would not any court of justice under such circumstances hold that the customary charge or market value obtaining for years at all yards was reasonable? The legislature, however, interferes, and, taking sides in the matter with the class using the yards, ordains a maximum rate of fifteen cents, and makes it a crime to exact more. The owner of the stock-yards challenges the reasonableness of the rate prescribed by the legislature, and, asserting it is arbitrary, brings his rights before a court of justice for determination, and produces exactly the same evidence which was conclusive in his favor when establishing the reasonableness of his charge unaffected by the attempted legislative interference or regulation. And, again, as here, no evidence is adduced to the contrary. Is it the law that, although the testimony would be ample and conclusive according to ordinary rules of evidence to establish the reasonableness of the charge in the case first stated, it is not sufficient to establish exactly the same *fact* or *conclusion* in the second case? If so, it must be because of a legislative enactment. Does the legislative fiat then change the nature of the question? Does the subject matter of the controversy become essentially different? If the

charge for a service rendered is judicially reasonable under one aspect, does it become unreasonable presumptively because so decreed by a legislature? In a word, is not reasonableness to be determined in both aspects by the same evidence and the same rules which, as Mr. Justice Blatchford said in the *Minnesota* case, have been provided and approved by "the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy"?

At most the legislation merely creates a *prima facie* case against the property owner. But no rule of presumption should operate against him and no burden of proof should bear him under, or deprive him of relief. His substantial legal position and right should ultimately be the same as if there had been no enactment, and the cattle owner was seeking, without the support or cover or mask of an arbitrary act of the legislature, to use the yards without paying a reasonable charge or compensation.

If, as may well be the rule, there is a strong legal presumption in support of legislation with respect to tax laws from considerations of a wise public policy, and with respect to railroad rates also because of public policy, and likewise because of the reserved power to regulate, nevertheless, the true rule in the case of private businesses must be that there is no such presumption and that the property owner comes into court free to establish the justice of the issue according to ordinary rules of procedure, that in so doing his legal rights remain unimpaired and unprejudiced by legislative fiat, and that he is to establish the truth of his claim by the same substantive evidence as he would without legislative regulation. The province and prerogative of the judiciary remain unchanged. We may well concede that the legislative rates are to be treated as *prima*

facie reasonable as a rule of evidence requiring some testimony to overcome, but we submit that they have no more force; the enactment does not change or shift the burden of proof. Every lawyer knows that this *prima facie* effect will be practically of great value to the individual; it will compel the owner of the stock-yards or warehouse or elevator to produce evidence in the first place, which will be examined and scrutinized under the scorching test of adversary litigation; it will force such owner to prove the market value of the service, and to show that his charges are the customary rates, or, if more than the customary rates, the facts which justify the excess. But if the owner of the stock-yards or warehouse or elevator does produce testimony tending to establish the reasonableness of the charge, and there is nothing in opposition but the legislative enactment, then he should be entitled as theretofore to judgment. Otherwise, the bare enactment places him at a material and prejudicial disadvantage, which in most cases would turn the protection of the Constitution of the United States into a mere mockery. In *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 397, Mr. Justice Brewer said:

> "Yet it has always been recognized that, if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter and to award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. *The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature instead of the carrier prescribes the rates.*"

In *Smyth* v. *Ames*, 169 U. S. 466, 527, Mr. Justice Harlan said:

> "The idea that any legislature, state or Federal, can conclusively determine for the people and for the

courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."

In *Chicago &c. Railway Co.* v. *Minnesota*, 134 U. S. 418, 458, Mr. Justice Blatchford said:

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

The primary function of all government is the protection of the property and of the personal rights and liberties of the individual. Governments are created for that fundamental purpose. Under the American system, if there is a presumption, it is always in favor of the individual and of liberty of action. Indeed, when a court

finds that the legislature for the first time seeks to regulate a business under the exercise of the so-called police power, and to radically reduce *customary* charges under the pretense that the public good so requires, it ought to be made to appear that the legislation is justified by some necessity, and that the extent of the interference with private business is reasonably necessary to prevent extortionate or unjust charges. The most vital principle in the creation of our system of constitutional governments is the maintenance of clear lines of separation between the legislative and judicial branches; and the strict adherence to this separation of the different branches is the essence of a republican form of government. We appreciate the disinclination of the courts to interfere with the legislative branch. Yet we must also recognize that the legislature should not be permitted to encroach, however slightly, upon the legitimate functions and prerogatives of the judicial branch. There is far more danger that the legislature will encroach upon the judicial branch than there is that the judiciary will ever encroach upon the legislative branch. As Webster so well said:

> "It cannot be denied, that one great object of written constitutions is to keep the departments of government as distinct as possible; and for this purpose to impose restraints designed to have that effect. And it is equally true, that there is no department on which it is more necessary to impose restraints than the legislature. The tendency of things is almost always to augment the power of that department, in its relation to the judiciary."[1]

The constitution of Kansas and the fundamental prin-

[1] Webster in "Independence of the Judiciary," Little, Brown & Co.'s edition of works, vol. 3, p. 29; see also Ford's "Federalist," No. 49, pp. 334 *et seq.*

ciple of our system of republican government vest the legislative power and functions in the legislature and the judicial power and functions in the courts. We know how anxious this court ever is not to encroach upon the legislative branch; but we also know that any encroachment upon the judicial branch, however slight, will be checked by that tribunal to which, above all others, is entrusted the duty of preserving constitutional government. If this class of legislation is to be construed as establishing more than *prima facie* evidence of reasonableness and as creating a presumption, more or less effective and binding upon the courts, and a heavier burden of proof than was previously required and practically prohibitive of relief, then it is an interference with the judicial function in a matter which this court has declared is essentially for judicial investigation and adjudication. It is true that every presumption should favor the constitutionality of an act of the legislature when we are dealing with the taxing power and other governmental functions, which in their nature and from sound grounds of public policy should be subject to interference from the judiciary only in clear cases of abuse of power. It may be so in the regulation of tolls of public corporations. But it should not be so in the case of essentially private property. Above all constitutions, as well as prior to all constitutions, are the individual rights of liberty and property, which have never been parted with—those "equal and inalienable natural rights" which the constitution of Kansas declares are possessed by the people, which the Fourteenth Amendment sought to protect against the assaults of temporary majorities, and in the support and defense of which it is the duty of the judiciary to be jealous against encroachment.

In the ever-to-be-remembered oration in the *Dartmouth College Case*, Webster said (4 Wheat. 518, 579, 581, 582):

> "If the constitution be not altogether waste paper, it has restrained the power of the legislature in these particulars. If it has any meaning, it is, that the legislature shall pass no act directly and manifestly impairing private property, and private privileges. It shall not judge, by *act*. It shall not decide, by *act*. It shall not deprive, by *act*. But it shall leave all these things to be tried and adjudged by the law of the land. . . Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land. . . Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for courts to administer, or for men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees; not to declare the law, or to administer the justice of the country."

IV.

The effect of the statute on the gross and net earnings of the stock-yards company.

But if the value in itself of the service rendered and the reasonableness of the customary charge are not to be controlling in this class of cases, and if the return upon the value of the property is to be the sole test, or an element in determining reasonableness, then the inquiry is presented as to the effect of the legislation upon the company's net earnings, and if the reduction be radical, as to whether or not such a reduction will leave enough net income to afford a fair, just and reasonable compensation on the true value of the property. Of course, the return on the value of the property employed may frequently be an important element in determining the reasonableness of a charge.

The customary rates before the legislation in question were 25 cents per head of cattle, 10 cents for calves, 8 cents for hogs, and 5 cents for sheep (p. 64). The statute reduced these charges to 15 cents for cattle, 8 cents for calves, 6 cents for hogs and 4 cents for sheep (p. 41), that is to say, from twenty to forty per cent., and reduced the net earnings of the business from $476,974.08 to $176,322.31, a reduction of $300,651.77 or over 63 per cent. under the contention of the appellants, or from $476,974.08 to $345,906.96, a reduction of $131,067.12, or 28 per cent. under the contention of the Attorney-General of Kansas. The latter's contention rests wholly upon the ground that the stock yards had no right to deduct from the gross earnings the sum of $169,584.65 representing necessary betterments and improvements or to deduct any allowance for depreciation and necessary wear and tear. The whole position of the defense is grounded upon the proposition that this industrial company was bound as matter of law to capitalize these improvements, which did not tend to increase earnings and which only equalled a fair allowance for depreciation.

It is true that the company, prior to 1896, had capitalized most of its extensions or improvements. The contention below (see answer, p. 885) was, therefore, that, as the company had capitalized extensions or improvements in the past, it must continue to do so in the future. Under this theory, the company must keep on year after year increasing its capital stock for whatever improvements or extensions the necessities of the business might require, whether or not this construction added to earning capacity. If not willing, *or if unable by the sale of stock or bonds*, to capitalize improvements necessary in order to retain the business

and market at Kansas City, the company must cease improving its facilities, and progress is to stop. It must at once occur to the court that if any such company could, as between itself and the public, indefinitely capitalize improvements or betterments and not provide for them out of earnings, or make any allowance for depreciation of the old plant, it would, in the course of time, inevitably become grossly over-capitalized. As in the case at bar, a great deal of capital is constantly sunk and disappears in the construction of improvements to take the place of the original plant (p. 219), and to represent this old plant frequently nothing remains. It must also occur to every fair mind that in such a case we should find the state of Kansas insisting that betterments and improvements in the past which it was known would not increase the earning capacity and which took the place of existing plant should have been paid for out of earnings and ought not to have been capitalized and the additional burden imposed upon the public. It would, of course, be insisted that the stockholders must either pay for these improvements out of income, or put their hands in their own pockets; but that the public could not be compelled to go on indefinitely paying increased charges in order to furnish returns upon such expenditures, especially if the company had made no allowance in its accounts for depreciation.

In assigning the reasons for dismissing the bill of complaint, Thayer, C. J., does not discuss the point of depreciation, although Foster, D. J., did so in denying the motion for a temporary injunction. The latter adverted to the fact that the master had made no report on the subject, and then proceeded to estimate a depreciation of only $75,400, based upon the assumption that, as to some of the improve-

ments, two per cent. would represent the depreciation, which is without support of competent evidence in the record (record, pp. 871, 872; 82 Fed. Rep. 849) and utterly conflicting with common experience and common sense.

Thayer, J., was likewise in error in his conclusion concerning the $169,584.65 disbursed in 1896, as shown by the stipulation of the parties (pp. 89–91). He remarked that "a very large part of the sum last mentioned [$169,584.65]—all of it, in fact, except about $6,000—was expended in building new structures and making permanent improvements" (p. 945). An examination of the disbursements of 1896 for "operation, maintenance and extension of improvements," shows that the following amounts were expended in what can fairly and reasonably be said to be either repairs or renewals (pp. 89–91):

For vault in the building	$386 08
For washroom in horse stable, to take the place of the old one	220 77
Labor and painting on horse stable	33 92
Office-rooms in building	831 12
Taking out old front of barn, and rebuilding it.	1,541 18
Additional windows in transit-house	56 13
For moving old barn and fitting it up	600 00
One scale-house and scales in the sheep division.	1,557 19
For rebuilding a worn-out train office	700 00
New drainage pipes, taking the place of former drainage system	2,416 09
For paving, to take the place of worn-out paving.	44,492 07
Total	$52,834 55

In the place of only $6,000 being expended in repairs and renewals, there was thus actually expended in 1896, $52,834.55, in addition to the ordinary current repairs, which were $32,209.22 (p. 70).

Now, it ought to go without saying, and we must assume that a court of equity will recognize, that in the operation of a plant such as the stock-yards, and notwithstanding repairs, there is a constant wearing out of the buildings, fences, pens, pavements, etc., from natural causes and wear and tear, and a constant necessity for replacing old with new, and that in estimating the profits of operation an allowance must necessarily be made for this wear and tear and depreciation and renewal. This view as to depreciation and that improvements may be properly charged against income is fully supported by the authorities. *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 407; *San Diego Land & Town Co.* v. *City of National City*, 74 Fed. Rep. 79, 83, 87; 174 U. S. 739, 757; *Little Miami, &c., R. R. Co.* v. *United States*, 108 U. S. 277, 278; *Union Pacific R. R. Co.* v. *United States*, 99 U. S. 402, 420; *United States* v. *Central Pacific R'd Co.*, 138 U. S. 84, 86; *Southern Pac. Co.* v. *Board of Railroad Com'rs*, 78 Fed. Rep. 236, 266; *Metropolitan Trust Co.* v. *Houston & T. C. R. Co.*, 90 Fed. Rep. 683, 690; *Whittaker* v. *Amwell National Bank*, 52 N. J. Eq. 400, 404; *Glasier* v. *Rolls*, L. R. 42 Ch. Div. 436, 453; *Dent* v. *London Tramways Co.*, L. R. 16 Ch. Div. 344, 353; *Davison* v. *Gillies*, L. R. 16 Ch. Div. 347; *Reg.* v. *Grand Junction R. Co.*, 4 Ad. & E. N. S. 18, 41; *Regina* v. *Railway Co.*, 15 Ad. & E. N. S. 313, 363; *Regina* v. *Railway Co.*, 15 Ad. & E. N. S. 1085, 1088; *Corry* v. *The Londonderry and Enniskillen Railway Company*, 29 Beavan, 263, 273.

The following quotation from Greene on "Corporation Finance" (1897; pp. 83, 114), is singularly applicable to the facts of this case, and will show how one of the best known auditors in the country would treat such a situation

as we find in the case of the Kansas City stock-yards. The language is so much in point on this question of depreciation that an unusually long extract may be permissible. He says:

> "One of the perplexing things in the financial management of a large manufacturing or trading company, is the treatment of the expenditures for the care of the plant. A depreciation account in some shape must be kept by every company or firm in business. The real estate may decline in value, and in any case, in any progressing concern, money will be required to be spent each year to adjust the buildings more perfectly to the requirements of the business, and yet these adjustments may not add anything to the salable value of the property, and should not, therefore, be added in the accounts to the company's investment in real estate. In like manner, machinery will wear out, and is always subject to the danger of new inventions, which may render the old machinery practically worthless. It is not easy to foresee when a new outfit will be in part or in whole required, though experience soon places a limit to the number of years in which a given set of machinery may be useful. The proper course in these cases is always the conservative one. The corporation should estimate the probabilities of depreciation always against itself, and set aside yearly such sums from its profits as will suffice to renew so much of the plant as may be expected to wear out or to become useless in a given time. Unless this depreciation fund is carefully thought out and its separation from profits rigidly insisted upon, the shareholders of the corporation and perhaps the bondholders may in the course of years find that their securities cover a property of little or no business value. If certain sums are not set aside to meet this depreciation, and if for this reason dividends are paid larger than would otherwise be the case, to the extent to which this is carried the returns received by the shareholders are not dividends but their capital returned to them in piecemeal. These depreciation sums should be real and not merely bookkeeping liabilities of the company to itself.

"Modern corporation accounting requires that in theory a sharp line of distinction should be drawn between outlays which may be considered a part of the regular working expenses, and those which are chargeable to an increased investment in the business. In theory the former should be deducted from the gross earnings before the net revenue is determined, while the latter may be met by an increased issue of bonds or shares. There is no doubt of the correctness of this principal in general, but in its practical application it is subject to great modification. English shareholders in American corporations usually insist upon such a system of accounting as divides the expenditures strictly according to this rule; and such indeed is the general practice in Great Britain. By charging to capital every item small and large which could by any possibility be construed to be a betterment, the British railways have increased their capitalization until they are dependent for a continuance of interest payments on good traffics year by year. Thus far no harm has come to these railways from this policy, because the fluctuations in the volume of their traffics have been comparatively slight.

"But in the United States more caution must be observed in this matter. From the very nature of the case, business of all kinds in a developing country must be more subject to changes in profitableness than in older countries. The very character of the American people, energetic and progressive, makes business all the more liable to such fluctuations. Bad years follow good years in every line of American industry, although differences are less violent in those trades which are the longest established and among those companies which have been in operation long enough to render their business comparatively stable. The principle, therefore, of charging all so-called betterments to capital and meeting the cost from the sale of bonds or shares, requires modification according to the circumstances of each particular company. The more fluctuating the volume of business has been or is likely to be, the more important is it that in one form or another a part of the profits in prosperous years should be withheld from the shareholders and

put into the property or set aside for its renewal. To those who wish a working principle to distinguish the proper items to be charged to capital account in the actual management of American corporations, railway and other, the following definition is suggested: No additions to the property either to the real estate or to the machinery (if a manufacturing company), or to the roadbed and track (if a railway company), should be considered betterments and charged to capital, unless they increase the productivity or earning capacity of the plant. Under this rule the purchase of additional equipment for a railway would be an expenditure which could conservatively be met by the issue of bonds or equipment notes, because such purchases would enable a larger volume of traffic to be handled; on the other hand, the replacement of a wooden bridge by an iron one would not be a proper charge to capital, under our definition, unless it was one of a series of expenditures deliberately resolved upon in order that heavier trains could be run and a larger volume of traffic handled, thus increasing the revenues of the company—an increase which our theory demands should be clearly seen to be possible after the various amounts of capital set aside for this purpose had been spent. The same rule might be applied to corporations other than railways; the safe course is to charge against revenues (possibly through the profit and loss account) the cost of all additions to the property which do not increase the output or decrease the cost of production. Yet any rule or any principle in so delicate a matter can properly be applied in each case only after a careful study of all the circumstances, including the business of past years and the prospect for the future. . . .

Every active concern must in some shape keep a depreciation account, to which shall be charged certain sums for renewal of machinery, etc., before profits are divided. If this is not done, the company will at the end find itself without plant and without money."

This rule of the practical man of affairs ought to be sanctioned and approved by this court.

In *Union Pacific R. R. Co.* v. *United States*, 99 U. S.

402, the second paragraph of the syllabus is as follows:

> "'Net earnings,' within the meaning of the law, are ascertained by deducting from gross earnings all ordinary expenses of organization and of operating the road, and expenditures *bona fide* made in improvements, and paid out of earnings, and not by the issue of bonds or stock."

And on pp. 421–422, Mr. Justice Bradley said:

> "*We think that the true interest of the Government, in this case, is the same as that of the stockholders; and will be subserved by encouraging a liberal application of the earnings to the improvement of the works.* . . . We are disposed to agree, therefore, with the judge who delivered the concurring opinion in the court below, that the 27th item of expenditure, as stated in the table of expenses in the 18th finding, entitled 'expenditures for station buildings, shops, etc.,' is a charge that may properly be made against earnings, since, as the fact is, such expenditures were actually paid therefrom, and were not carried to capital account."

In the case of *United States* v. *Kan. Pac. Railway Co.*, 99 U. S. 455, 459, in reference to the expenditures to be charged against gross earnings before reaching net income, the court said:

> "The former [referring to the government] insists that certain items should be excluded from the account which are claimed by the latter [meaning the railroad] to be legitimate. These items are designated in Schedule C, annexed to the findings of the court below, and are as follows:—
>
> "*First.* 'Depreciation account, or expense not charged up.' This is explained to be the amount necessary to put the road in proper repair, but which was not actually expended for that purpose. We are clearly of the opinion that it is not a proper charge. Only such expenditures as are actually made can with any propriety be claimed as a deduction from earnings.
>
> "*Secondly.* 'Construction account, or improvements and additions to track,' etc. This item, according to

what we have said in the Union Pacific Railroad case, ought to be allowed.

"*Thirdly.* 'Equipment account, or replacing and rebuilding rolling stock, machinery,' etc. This item should also be allowed as an expenditure properly chargeable to the earnings of the road, when actually paid out of the earnings and not raised by the issue of bonds or stock.

"*Fourthly.* 'Real estate purchased for depot grounds, etc., and expenses of same.' This item is a proper charge if actually paid out of the earnings, and not raised by bonds or stock."

In *Southern Pacific R. R. Co.* v. *Board of Railroad Commissioners*, 78 Fed. Rep. 236, the circuit court held as stated in the seventeenth paragraph of the syllabus:

"*Held*, further, that in ascertaining the cost of operating a railroad, with reference to determining the reasonableness of rates, the expenses of operation are not to be strictly limited to the cost of running trains, excluding all betterments, but the cost of reasonable renewals and improvements of roadbed, track and equipment should be included in the operating expenses."

In the case of *Davison* v. *Gillies*, reported in note to *Dent* v. *London Tramways Company*, 16 Chancery Division, 344, 347, 348, Jessel, M. R., said:

"Then I have to consider the question, What are net profits? A tramway company lay down a new tramway. Of course the ordinary wear and tear of the rails and sleepers, and so on, causes a sum of money to be required from year to year in repairs. It may or may not be desirable to do the repairs all at once; but if at the end of the first year the line of tramway is still in so good a state of repair that it requires nothing to be laid out on it for repairs in that year, still before you can ascertain the net profits, a sum of money ought to be set aside as representing the amount in which the wear and tear of the line has, I may say, so far depreciated it in value as that that sum will be required for the next year or next two years.

> "Take the case of a warehouse. Supposing a warehouse-keeper, having a new warehouse, should find at the end of the year that he had no occasion to expend money in repairs, but thought that, by reason of the usual wear and tear of the warehouse, it was a thousand pounds worse than it was at the beginning of the year, he would set aside one thousand pounds for a repair or renewal or depreciation fund before he estimated any profits; because, although that sum is not required to be paid in that year, still it is the sum of money which is lost, so to say, out of capital, and which must be replaced. I should think no commercial man would doubt that this is the right course—that he must not calculate net profits until he has provided for all the ordinary repairs and wear and tear occasioned by his business."

If, according to the contention of the Attorney-General of Kansas, improvements and renewals must be capitalized year after year irrespective of the effect upon earnings, then it is submitted that, before we can arrive at any just conclusion as to current profits, there must, in common fairness, be an allowance for depreciation of at least ten per cent. of the *cost* of the present plant, which was shown to be $1,593,038.07 (p. 350). Therefore, in the case at bar, whether we deduct improvements from income and write off nothing for depreciation, or capitalize improvements and allow a fair amount for depreciation, it will follow that about the sum in question ought to have been deducted from the gross earnings of the property in 1896 before the actual net earnings could have been justly and truly determined.

But, so the allegation of the answer was (p. 885) and so the argument seemed to run on the prior hearing, the company capitalized in the past whenever it added extensions or improvements, and it cannot stop now; it must continue year after year the practice of issuing new stock

and increasing its capital even though this course would ordinarily be imprudent or improper, and must inevitably in time lead to gross over-capitalization. This should hardly be a fair argument for the Attorney-General to make. The true interests of the people of Kansas, or, to quote his brief, the "Kansas farmer," are that the capitalization of such a company, upon which capitalization some return must be earned, shall be kept as low and upon as conservative a basis as practicable. With what patience would a court listen to an argument that a manufacturing corporation, whose earnings had reached their probable maximum, should capitalize every betterment and improvement, and issue bonds or stock for new machinery or fixtures; or even to an argument that a railroad company, which is a far more permanent business, must capitalize year after year all expenditures for renewals and increased weight of rails, for improvement of existing road-bed, for station houses rebuilt in brick or stone to replace wooden structures, etc., etc., notwithstanding the fact that the managers believed that there was a constant depreciation from wear and tear equivalent to these improvements and that the company had reached its maximum earning capacity?

Can it be doubted that, under such circumstances, the stock-yards company would not have been justified in selling new stock for funds or expenditures which could not of themselves earn a dividend, or in selling bonds to procure funds upon which the business would not earn the interest? Can there be any reasonable doubt that this court will sanction and approve the making of these necessary improvements and renewals out of earnings if only about equal to a fair provision to cover inevitable depreciation?

The facts and figures set forth in the statement of fact

ought to establish beyond cavil the propriety and truth of the position taken by the managers of the stock-yards company in respect of the necessary improvements and betterments made in 1896, namely, that they could not consistently issue and sell new stock or bonds to provide the funds therefor, and that they could properly charge the improvements against earnings, because they fairly equaled the actual depreciation.

A different view would lead to results which sound policy ought to forbid. The court will not declare that, under the circumstances disclosed by this record, the stock-yards company must necessarily go on indefinitely capitalizing such expenditures, and make no allowance for depreciation. It would be difficult to imagine a more objectionable and dangerous system of corporate financing in the case of a company in which the state or the public claims an interest to prevent excessive capitalization and extortionate charges.

Expressions in some of the reported decisions may be found to the effect that improvements and betterments in the case of railroads may or should be provided for out of capital stock or bonds. A careful examination will disclose that none of these decisions presented facts similar to those now before the court. Some of these cases turned upon peculiar provisions securing the rights of income bondholders or preferred stockholders, or the claims of the government, as in the Pacific Railroad cases. But, in every one of the rate cases where this point has been presented, the courts have uniformly ruled not only that allowance for depreciation was proper, but also that betterments and improvements could fairly and equitably be charged against income.

The fact that the improvements in question were

charged to a construction account or were called permanent improvements is immaterial. The controlling element is that the expenditures were necessary in order to keep the stock-yards in serviceable condition, and this fact is undisputed. Certainly the mere title under which these expenditures are once stated in books of account is not sufficient to overthrow the facts so fully and clearly shown, namely, that the improvements were necessary, that they were about what will be required yearly, that they only equal the annual depreciation of the plant, that they do not increase the earnings or earning capacity, and that the business in all probability has reached its maximum. As Mr. Justice Brewer said in *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 407:

> "Those are facts whose significance cannot be destroyed by any mere manner of bookkeeping or classification of expenditures."

It is, therefore, submitted that, in determining the net profits which the property earned in 1896, the improvements made during that year and amounting to $169,584.65, about equaling the annual depreciation, or to state it more simply, at least ten per cent. on cost as the depreciation of the plant, viz., $159,303, must, in fairness to the stock-yards company, be paid out of the earnings and treated as a fit and proper deduction from the gross income. If this be true, then it necessarily follows that the net earnings for the year 1896 would be about $476,974.08, and that the conceded result of the statutory schedule would be to reduce these net earnings to $176,322.31, a reduction of over sixty-three per cent. In view of this radical effect upon the income of the stock-yards company, it is not surprising that both the judges below should have confessed that they thought the reduction "radical," and that the issues were balanced with doubt.

As Mr. Justice Harlan said, quoting from the opinion of the circuit court in *Smyth* v. *Ames*, 169 U. S. 466, 542:

> "It must be remembered that these roads are competing roads; that competition tends to a reduction of rates—sometimes, as the history of the country has shown, below that which affords any remuneration to those who own the property. Can it be possible that any business so carried on can suffer a reduction of 29½ per cent. in its receipts without ruin? What would any business man, engaged in any business of a private character, think of a compulsory reduction of his receipts to the amount of 29½ per cent.?"

The following tables may be of assistance to the court in considering the result in percentages in four aspects, viz.:

(*a*) Without deducting anything for construction or depreciation;

(*b*) Deducting $75,400 for depreciation upon the basis suggested by Foster, D. J. (pp. 871–872), which would be only 5 per cent. upon the value of improvements and allowing nothing for additional improvements or betterments;

(*c*) Deducting $169,584.65, amount actually expended for improvements in 1896, and allowing nothing for depreciation; and,

(*d*) Deducting $159,303 for depreciation, being ten per cent. of the cost of the plant (pp. 121, 225, 350, 443, 590) and allowing nothing for improvements or betterments.

I.

Master's finding of property used for stock-yards purposes, as set forth in findings XLIII, XLIV, XLV and XLVI (p. 77).....$5,388,003 25

made up as follows:

Valuation of stock-yards lands as bare land without improvements	$3,600,626 00	
Valuation of improvements	1,480,000 00	
Valuation of supplies, wagons, horses, feed, etc.	307,377 25	
		$5,388,003 25

(*a*) Net income at statutory rates, without deducting anything for construction or depreciation would be $345,906.96, or equal to 6.4 per cent. on above valuation.

(*b*) Net income after deducting $75,400 for depreciation would be $270,506.96, or equal to 5 per cent.

(*c*) Net income after deducting $169,584.65 expended for improvements would be $176,322.31 or equal to 3.2 per cent.

(*d*) Net income after deducting ten per cent. for depreciation, $159,303, would be $186,603.96, or equal to 3.4 per cent.

2.

Master's finding of property used for stock-yards purposes (p. 77)		$5,388,003 25
Add property erroneously excluded, as set forth in finding XLI. (pp. 75–76)	1,200,000 00	
Add property used in mule and horse department (p. 72)	430,420 00	
Add expenditure for packing plants (p. 61)	817,944 28	
Making total valuation of		$7,836,367 53

(*a*) Net income at statutory rates, without deducting anything for construction or depreciation, would be $345,906.96, or equal to 4.4 per cent. on above valuation.

(*b*) Net income after deducting $75,400 for depreciation would be $270,506.96, or equal to 3.4 per cent.

(*c*) Net income after deducting $169,584.65 expended for improvements would be $176,322.31, or equal to 2.2 per cent.

(*d*) Net income after deducting ten per cent. for depreciation, $159,303 would be $186,603.96 or 2.3 per cent.

3.

Fair present valuation of lands for stock-yards purposes (pp. 192, 330, 331), at least	$5,600,000 00	
Master's valuation of improvements (p. 77)	1,480,000 00	
Master's valuation of supplies, wagons, horses, feed, etc. (p. 77)	307,377 25	
Horse and mule department (p. 72)	430,420 00	
Spent for packing plants (p. 61)	817,944 28	
Working capital, consisting of cash and credits (p. 76)	400,000 00	
Good-will on master's valuation (p. 78)	780,000 00	
Making a total valuation of		$8,815,741 53

(*a*) Net income at statutory rates, without deducting for construction or depreciation, would be $345,906.96, or equal to 3.9 per cent. on above valuation.

(*b*) Net income after deducting $75,400 for depreciation would be $270,506.96, or equal to 3.1 per cent.

(*c*) Net income after deducting $169,584.65 for improvements would be $176,322.31, or equal to 2 per cent.

(*d*) Net income after deducting ten per cent. for depreciation, $159,303, would be $186,603.96, or equal to 2.1 per cent.

V.

The fair present value of the stock-yards property.

The Attorney-General of Kansas candidly conceded in the brief heretofore filed that neither the actual cost of the property nor the amount of the original investment was controlling as a basis of valuation, that the property had greatly increased in value, and that the stock-yards company should be permitted to earn a reasonable interest upon the present value of its property. As stated on pages 76–77 of his brief:

> " We do not ask that the Kansas City Stock-Yards Company be permitted to earn only a reasonable percentage of profit upon the money which has been actually invested in its business or upon the actual cost of its property. *We recognize the fact that this property has greatly increased in value since the organization of the stock-yards, and we are willing that the company be permitted to earn a reasonable interest upon the value of its property.*"

This broad concession, embodying as it does the true and just rule of law, greatly simplified and narrowed the discussion. Only two points, therefore, remain to be discussed upon this point, namely: (1) what is a reasonable interest upon money invested in an industrial enterprise of this nature, and (2) what is the true and fair present value of the property as shown by the testimony. It is important to call attention to the fact that the Attorney-General did not attempt, in any part of his discussion, to challenge the correctness of the following statement of Thayer, C. J., below (record, p. 945; 82 Fed. Rep. at p. 856):

> " Conceding, as we must, that the legislation complained of was radical in its nature and effect, that it reduced the company's income about fifty per cent., *and that it prevents it from realizing on the capital invested in its plant such a per cent. as is ordinarily realized on capital invested in other mercantile and business enterprises*," *etc.*

1.

As to what is reasonable interest or compensation on such an investment.

As we have seen, the Attorney-General stated in his brief that " we are willing that the company be permitted to earn a reasonable interest upon the value of its property " (defendant's brief on original argument, p. 77). The rate which would be deemed a reasonable interest is not stated, but presumably it would be at least six per cent.,

because the defense strives to show that the statutory rates afford at least that return. Common knowledge justifies the assertion here that six per cent. is an insufficient return on money risked in industrial enterprises, which in this country are so liable to damage or destruction by changes of markets and railroad centres and conditions. Such a return would seldom tempt investors to risk their capital in a venture like this which in 1871 must have seemed very doubtful. Success has attended the investment in this case, but failure might have swamped the capital of the owners. The risk was wholly theirs. Under such circumstances, ought not the profit to be more than the current rate of interest of money loaned on security? But even that, this legislation denies.

The appellants do not contend that owners of stock-yards are entitled as matter of fixed right to earn at least six per cent. upon the value of their property and capital invested in the business, irrespective of the reasonableness of the charge made to the public. But they do urge that in all fairness and justice they are entitled to receive the fair value of money in the state of Kansas so long as the charges are customary and in themselves reasonable for the service rendered. They urge that they assumed and still assume the risk of the market continuing at Kansas City. They concede that, if competition should cut down their receipts, they cannot increase their charges beyond what is a reasonable charge for the services they render. They simply ask the fair value of money so invested in industrial enterprises "as it stood in the markets of the world, and not as prescribed by an act of the legislature," so long as they do not make unreasonable charges to those who use their yards.

The business and the receipts at the yards have been

built up by the industry and energy of the managers and owners of the stock-yards and by the risk of their capital. The stock-yards would never have been established nor a dollar invested in such an uncertain and speculative venture (pp. 354, 442, 458, 459) if the owners had conceived it possible that, as soon as they had built up a large trade and successful business, the legislature would step in on behalf of their customers and limit their profits below the rate at which they could lend money on security without practical risk. Indeed, if the owners of the stock-yards were tomorrow seeking to purchase land and establish new yards and to borrow money for that purpose in Kansas, they would have to pay at least six per cent., and probably as high as from eight to ten per cent., for the use of the money. In that event, their earnings under the statutory rates would be less than their fixed charges. The question cannot be changed in its substance because the Kansas City Stock-Yards Company has been so well and conservatively managed that it has not a dollar of bonded debt, and has from time to time secured all the money it needed either by cash contributions from the stockholders or by the investment in the enterprise of profits as they accrued.

The value of money, or, in other words, its earning power in Kansas, may be appreciated by reference to the appendices annexed to this brief, taken from official reports and state records, which show, for example, that in the year 1897 the state banks paying dividends averaged nearly 8 per cent. per annum (appendix C); that the private banks paying dividends averaged over 18 per cent. per annum, and distributed an amount sufficient to make more than 8½ per cent. on all the capital so employed in the whole state (appendix D); and that the current

rates of interest on municipal bonds was at least 7 and frequently as high as 10 per cent. (appendix E). This is true of a class of investments regarded as conservative, and not speculative, while any attempt to establish and build up a cattle market must necessarily be an extremely hazardous speculation.

The statutes of Kansas provide that the rate of interest for the use of money shall be six per cent. in the absence of an agreement fixing a different rate, and that the maximum shall be ten per cent. (Vol. 2, Gen. Stat. 1897, ch. 116, p. 596). This provision is the expression of the thought and estimate of the state itself as to the minimum value of money and as to what justice requires for the use of it. *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 411. It is the legal measure of the value of the use, not only of money, but of property generally, and is a fair and just basis in most cases. *Loudon* v. *Taxing District*, 104 U. S. 771, 774; *Spalding* v. *Mason*, 161 U. S. 375, 396. But it is not a fair or just basis in a speculative venture. In Kansas, all loans upon the security of real or personal property earn from six to ten per cent. when there is practically no risk for the lender. The rate of six per cent. is seldom accepted, and ten per cent. is frequently stipulated for, particularly in industrial ventures. As we have seen, the most conservative investments in the state, such as municipal bonds, bear from seven to ten per cent. interest. It is, of course, a matter of common knowledge that the reasonable expectation of profit in industrial ventures is always more than the rate obtained for money loaned on security, for the obvious reason that the risk is greater. The court below conceded that the rates prescribed by the legislature in this case prevent the stock-yards company "from realizing

on the capital invested in its plant such a per cent. as is ordinarily realized on capital invested in other mercantile and business enterprises." Is it not then a gross injustice under such circumstances for a legislature to say that the stock-yards company is not entitled to reap the legitimate reward of a successful industrial venture? Why is it not entitled to earn what is "ordinarily realized on capital invested in other mercantile and business enterprises," as against those who risked nothing and now insist upon their right to use the yards for their own convenience and profit? Will it not be held to be substantial justice—just to the class of the public using the yards for their individual profit as well as to the owner of the stock-yards—that such owner shall be entitled to earn at least the maximum allowed by the state statute when money is loaned upon security? If this be so, the court must hold that, as the legislative rates afford, in no reasonable aspect of the proof contained in the record, anything like six per cent., the statute violates the property rights of the owners of these stock-yards.

As Mr. Justice Brewer said in *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 410:

> "The equal protection of the laws—the spirit of common justice—forbids that one class should by law be compelled to suffer loss that others may make gain. If the State were to seek to acquire the title to these roads, under its power of eminent domain, is there any doubt that constitutional provisions would require the payment to the corporation of just compensation, that compensation *being the value of the property as it stood in the markets of the world, and not as prescribed by an act of the legislature?* Is it any less a departure from the obligations of justice to seek to take not the title but the use for the public benefit at less than its market value?"

Moreover, it will be a very disastrous day for the industries of this country, if this court shall, in the case at bar, adjudicate that even six per cent. is a sufficient profit to those who risk immense sums in endeavoring to establish new industries and who have, in case of failure, absolutely no recourse against any one, and who, in bad years and narrow markets and depressed conditions, must go without any return of profit upon their investment. If the court shall reach the conclusion that, in the case of private property and industrial ventures, a reasonable percentage upon the actual value of the property is the *limit* of the reward or profit which the investor can ever hope to reap except at the will or caprice or with the permission of a legislature acting on behalf of the class of the public who have found it to their individual profit and advantage to use private property, then it is submitted that the wiser decision will be not to declare any fixed rate of interest or profit, but rather that if the rates prescribed prevent such a concern as the Kansas City Stock-Yards Company "from realizing on the capital invested in its plant such a per cent. as is ordinarily realized on capital invested in other mercantile and business enterprises," the act is unconstitutional because arbitrarily interfering with the rights of private property and of individual liberty. The court has consistently declined to fix rates or to declare how much interest or profit may be reasonable in the case of public corporations, leaving the operation of practical experience and litigation to ultimately evolve some sound rule by means of inclusion and exclusion. That should likewise be the conclusion in the class of private industrial enterprises presented by the case at bar. The decision of such a case as this must necessarily act as a precedent in

numerous other cases of legislative interference with private property, and any intimation that legislatures may invade private property and interfere to limit to say six per cent. the legitimate profits of success, would open to legislative activity and meddling opportunities of immeasurable injury and injustice to industrial enterprises.

2.

As to the present value of the property of the stock-yards company.

In order to avoid useless discussion upon the elements of valuation or upon mere definitions, we may consider the statement made by the Attorney-General upon this question. He stated as follows (defendant's brief on original argument, p. 27):

> "That the value of the real estate is to be determined by considering it as a body of naked land upon the general market, subject to purchase and sale for all purposes for which a demand may exist—for *stock-yards*, for railroads, for packing-houses, for manufacturing and mercantile purposes, with all the advantages which may accrue to it in consequence of its location near the corn belt as well as the cattle ranges of the country, in the heart of a great city, surrounded by all the railroads, packing-houses, manufacturing and mercantile plants there existing and in operation, and by reason of the limited area of land in the vicinity available for such purposes."

This being the basis conceded by the Attorney-General, we assert that none of the witnesses called by the defense testified that they estimated the value of the property for *stock-yards* purposes or included the elements which should have been properly considered in estimating the true value. Therefore, the estimates of none of the witnesses called on behalf of the Attorney-General are to be taken or relied upon (see *supra* p. 33 and appendix B to this brief).

It is assumed that if this property has increased in value more than the finding of the master, this court will allow the full measure of that increased value, for that is the legal right as well as the just equity of every property owner. This actual present value, even if the property had cost nothing or had been donated, would clearly be the basis of valuation for every other purpose, including taxation and condemnation proceedings, and would be at once recognized by every fair-minded business man and every impartial court as the just value—just for the purpose of barter and sale, just for the purpose of taxation, just for the purpose of condemnation to accommodate some superior public use, and just for every other purpose. The property has greatly increased in value from its original cost; but are not the owners entitled to the full benefit of that increase? Is it not simple fair play that such a concern, whether owned by an individual or a private corporation, shall be allowed to reap the legitimate profit of the sagacity of its managers and the risk of its capital? Surely, it would not be just for a court to consider for a minute the *cost* when that is no longer the *actual value*. Will not a court of equity, in determining value, allow to such an owner something more than the bare value of the naked land without regard to its use and of the materials used in the structures? Would not the basis of actual cost of present reproduction be obviously an unfair valuation as between man and man? Does it become a justifiable basis of valuation merely because the legislature sees fit to interfere for the benefit of the class using the market?

In view of the enormous changes in conditions at Kansas City set forth in the statement of facts, it would, indeed, have been preposterous if the Attorney-

General had ventured to urge upon this court that the land of the Kansas City Stock-Yards Company, more than one-third of which (forty acres) was purchased as far back as 1871, and fully three-quarters of which was purchased prior to 1880, had not greatly increased in value.

The record clearly shows that all the witnesses testifying on behalf of the Attorney-General valued the land owned by the stock-yards company on the hypothesis that it was naked or bare land, divested of all improvements. The master valued it on this basis (p. 77). None of these witnesses attempted in any manner to value the improvements, nor did any of them attempt to testify as to the value of the property in its then present condition, although some of these witnesses conceded that the property was in a most available situation and especially adapted for stock-yards purposes by reason of its singular location amidst surrounding railroad systems and packing and other manufacturing plants. Yet none of them estimated the fair and just value of the property for its most available and valuable purpose (pp. 619, 621, 632, 637, 645, 683, 684, 696, 697; see also *supra*, p. 33, and appendix B).

If the court shall hold that this property can, with any degree of fairness and justice to its owners, be valued on the basis of naked land and without regard to its special value for stock-yards purposes, it may well be conceded that there is some evidence in the testimony of the witnesses called by the Attorney-General tending to sustain the master's finding of $3,600,626 as the present value of the bare land used for stock-yards purposes, although the preponderance of qualified testimony showed a larger value; but if, on the contrary, the true and only just basis in such a case is (1) the value of the property as it stands with

its improvements, in other words, the value to the stock-yards company itself (*Monongahela Navigat'n Co.* v. *United States*, 148 U. S. 312, 343), or (2) the value of the land itself with due regard to any particular use to which it is especially adapted, then the master's estimates and all the testimony on behalf of the defense must of necessity be disregarded, and the court will determine from the testimony of the complainants' witnesses the true and just value.

It cannot be that, in a court of justice seeking to adjudicate what is fair and just as between the owner and the public, every element of value which would govern any conservative business man is to be discarded, and the mere cost of reproduction is to control. There can be no question as to the special availability of this property for stock-yard purposes, surrounded as it is by railroads and packing houses. That it is so available was practically conceded; and that fact necessarily increases its value. For that purpose, it is worth more than for any other purpose. It cannot be that its value for the purposes of this controversy is to be determined without regard to the one controlling and essential feature which would determine its real, actual or fair value in every other conceivable relation, including taxation or condemnation. If the legislature had determined to establish a public stock-yards at Kansas City at the expense of the taxpayers of the state, but for the particular benefit of owners of live stock, and the property of the Kansas City company had been selected for condemnation, can there be the slightest doubt that the state would have to pay the value of the land and improvements for stock-yards purposes?

We may again suppose that a legislature was about to regulate the charges of a hotel in Kansas City,

situated as conveniently as the Arlington Hotel is situated in Washington. In ascertaining the value of the property, would it be just to discard its value for hotel purposes and value it as naked land plus the value of the improvements? Would this basis be fair even in a condemnation proceeding? Would not the owner be entitled to show the special value of the property and its large earning capacity for hotel purposes? Would it be held that the only values to be considered in a court of justice were the value of the bare or naked land and the cost of reproduction? How preposterous it would sound for counsel to argue that the hotel owner could buy cheaper land a mile or two away and build a hotel there! Take the case of the large dry-goods concern at Kansas City, the Emery-Bird-Thayer Dry Goods Company (situated at Walnut and Eleventh Streets, record, pp. 662–663, 697). It occupies a large building, which is located upon land valued at several hundred thousand dollars an acre. If that land were about to be condemned for a railroad station, would not the owners be entitled to show that the property was especially valuable in that locality for the retail dry-goods business? It would obviously be grossly unjust to compel the owners to accept compensation upon the basis of bare land and cost of rebuilding. How unreasonable it would sound for counsel to argue that the owners could secure an equal amount of land a mile or two away from the business centre, and there build an equally large store!

Yet in the case at bar, the Attorney-General of Kansas suggested below, and may urge again, that the owners of the Kansas City stock-yards might move elsewhere, where they could secure cheaper land, but where, of course, they never could secure the advantage of adjacent packing

plants and railroad terminals without the expenditure of many millions of dollars.

The rule which obtains in condemnation proceedings under the exercise of the power of eminent domain as to what should be the elements in estimating the value of property may assist by way of analogy, although there are many equities entitling us to more consideration than is usually accorded a property owner where, under condemnation proceedings, his property must be taken for a necessary public use. (See the suggestion of Mr. Justice Brewer in *Ames* v. *Union Pac. Ry. Co.*, 64 Fed. Rep. 165, 178.) Yet, the court below refused to accord even what would be just in the case of condemnation proceedings.

In *Boom Co.* v. *Patterson*, 98 U. S. 403, it appeared that the boom company had the power of eminent domain and was seeking to condemn parts of two islands. The land in question, if assessed simply according to its value as bare land, aside from any consideration of its value for boom purposes, was worth only $300; but, in view of its adaptability for those particular purposes, the jury found a further and additional value of $9,058.33, making the total allowance $9,358.33. The trial court reduced the verdict to $5,500, and the question argued in this court was as to the basis upon which the compensation was to be estimated. Mr. Justice Field, delivering the unanimous opinion of the court and reviewing the authorities, used the following language (p. 407):

> "In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly

adapted; that is to say, what is it worth from its availability for valuable uses? Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated.

"So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future."

In the case of *National Waterworks Co.* v. *Kansas City*, 62 Fed. Rep. 853, the circuit court was called upon to investigate and determine the principle upon which a water company should be compensated when its property was taken by the city under the reserved contract right to do so at the expiration of the franchise. The argument advanced on behalf of the city was that the value should be limited to the cost of reproducing the plant. In the course of a very carefully prepared opinion, Mr. Justice Brewer said (p. 865):

"It is obvious that the mere cost of purchasing the land, constructing the buildings, putting in the machinery, and laying the pipes in the streets—in other words, the cost of reproduction—does not give the value of the property as it is to-day. A completed system of water-works, such as the company has, without a single connection between the pipes in the streets and the buildings of the city, would be a property of much less value than that system con-

nected, as it is, with so many buildings, and earning, in consequence thereof, the money which it does earn. The fact that it is a system in operation, not only with a capacity to supply the city, but actually supplying many buildings in the city,—not only with a capacity to earn, but actually earning,—makes it true that 'the fair and equitable value' is something in excess of the cost of reproduction. The fact that the company does not own the connections between the pipes in the streets and the buildings—such connections being the property of the individual property owners—does not militate against the proposition last stated, for who would care to buy, or at least give a large price for, a waterworks system without a single connection between the pipes in the streets and the buildings adjacent? Such a system would be a dead structure, rather than a living and going business. The additional value created by the fact of many connections with buildings, with actual supply and actual earnings, is not represented by the mere cost of making such connections. Such connections are not compulsory, but depend upon the will of the property owners, and are secured only by efforts on the part of the owners of the waterworks, and inducements held out therefor. The city, by this purchase, steps into possession of a waterworks plant,—not merely a completed system for bringing water to the city, and distributing it through pipes placed in the streets, but a system already earning a large income by virtue of having secured connections between the pipes in the streets and a multitude of private buildings. It steps into possession of a property which not only has the ability to earn, but is in fact earning."

The above case was never appealed, and the city acquiesced in the finding of the court.

See, also, on the proposition that the value of the land to the defendant company for stock-yards purposes should have been allowed, *Monongahela Navigat'n Co.* v. *United States*, 148 U. S. 312, 326, 328; *Grant* v. *East & West R. Co.*, 54 Fed. Rep. 569, 576; *Dupuis et al.* v. *C. & N. W. Ry. Co.*, 115 Ill. 97, 100; *C. P. & St. L.*

Ry. Co. v. *Eaton*, 136 Ill. 9, 14; *Snouffer* v. *Chicago & Northwestern Ry. Co.*, 105 Iowa, 681; *Drury* v. *Midland Railroad*, 127 Mass. 571, 582; *Columbia Delaware Bridge Co.* v. *Geisse*, 38 N. J. Law 39, 42; *Railroad Co.* v. *Patterson*, 107 Pa. St. 461, 464; *Montgomery Co.* v. *Bridge Co.*, 110 Pa. St. 54, 59; *Mifflin Bridge Co.* v. *Juniata Co.*, 144 Pa. St. 365, 367; *Miller* v. *Windsor Water Co.*, 148 Pa. St. 429, 439; *Rippe* v. *Chicago, Dubuque & Minnesota R. Co.*, 23 Minn. 18, 23; *King* v. *Minneapolis Union Ry. Co.*, 32 Minn. 224, 225; *The Mo. Pac. Ry. Co.* v. *Porter*, 112 Mo. 361, 369; *Webster* v. *The Kansas City & S. Ry. Co.*, 116 Mo. 114, 119, 120; *San Diego Land etc. Co.* v. *Neale*, 78 Cal. 69, 71.

It is, therefore, submitted that the testimony of the complainants' witnesses, who alone valued the property for stock-yards purposes, must be accepted, and that their minimum estimates fairly establish at least $5,600,000 as the value of the bare land without improvements (pp. 191, 192, 330, 331, 344).

There are several items which were disallowed by the master from his estimates of value of the capital invested in this business. These items are discussed in the statement of facts, and the relatively greater importance of other points compels us to rest upon that statement. But as to the expenditures for subsidizing packing plants, amounting to $817,944, a few words may be added.

The results have demonstrated the wisdom and success of the policy of subsidizing these packing industries and inducing the construction of packing plants. Is it not fair and just that this money expended in order to create a

market, as much for the benefit of the owners of live stock using the yards as of the owners of the yards themselves, shall be considered in determining the amount upon which the stock-yards company is entitled to a fair return? Of course, in any other transaction in life, this necessary outlay would at once be recognized as a legitimate capital expenditure and as having greatly increased the permanent value of the enterprise and property. Does it not constitute a fair element and a just equity in determining the values as between those who use the yards and the owners of stock-yards? There can be no reasonable doubt that as matter of law such expenditures out of the capital of a corporation are proper, particularly when it is shown that they have resulted advantageously. Nor can it be doubted that the courts would treat such an investment of capital as property subject to taxation and not "moonshine."

In considering what the patrons of the yards should rightly pay, the appellants submit that a court of equity will allow for all reasonable expenditures to bring to the yards the buyers, without whose presence the market itself would be worthless to the owners of live stock. How strong is the equity when it appears that the fruits of this policy are to realize for the live stock owner more than he can obtain at any other yard, and to benefit the class using the yards at least $1,500,000 per annum in better prices than are obtainable at other yards (p. 74). It would be a most unjust result if the live stock owners are to use the yards and profit by these expenditures, and yet are to be free to refuse to contribute anything towards the expense of a necessary outlay which has benefited them so materially.

As Mr. Justice Brewer said in *Adams Express Company* v. *Ohio*, 166 U. S. 185, 222:

> "What a mockery of substantial justice it would be for a corporation, whose property is worth to its stockholders for the purposes of income and sale $16,800,000, to be adjudged liable for taxation upon only one-fourth of that amount. The value which property bears in the market, the amount for which its stock can be bought and sold, is the real value. Business men do not pay cash for property in moonshine or dreamland. They buy and pay for that which is of value in its power to produce income, or for purposes of sale."

So, in the case at bar, what a mockery it would be to hold that, although the market value of the stock has ranged always above par, and most of the time at a premium of from fifteen to forty per cent. for every purpose of income and sale in the markets, representing a market value of $8,400,000 to $10,300,000 (pp. 314, 319, 354, 440, 453, 471), nevertheless, it must shrink to about 73 per cent. of par, or $5,388,003.25, the moment the state sees fit to interfere for the benefit of the class using the yards. That this market value of the capital stock would be a just basis of valuation for taxation in Kansas, see *Ryan* v. *Com'rs of Leavenworth Co.*, 30 Kans. 185, 189. See also *Adams Express Co.* v. *Ohio*, 166 U. S. 185, 220, and *Porter et al.* v. *R., R. I. & St. L. R. R. Co.*, 76 Ill. 561, 588.

3.

Summary.

We may now summarize the argument, so as to show the investment in the enterprise upon the master's basis of valuation and upon the basis of the fair present value for stock-yard purposes.

As to the master's basis of valuation:

1.	Master's valuation of stock-yards land as bare land without improvements (p. 77).....	$3,600,626 00
2.	Omission of parcels used for dumping manure and offal (pp. 75, 76).....	126,140 00
3.	Master's valuation of improvements *after deducting depreciation* (p. 77)	1,480,000 00
4.	Master's valuation of supplies, feed, &c. (p. 77).....	307,377 25
5.	Working capital, consisting of cash and credits (p. 76).....	400,000 00
6.	Expenditure for packing plants (p. 61)	817,944 28
		$6,732,087 53

But, if we take the fair present value of the land for stock-yards purposes, the result would be:

1.	Valuation of land for stock-yards purposes, at least.....	$5,600,000 00
2.	Omission of parcels used for dumping manure and offal	126,140 00
3.	Master's valuation of improvements...	1,480,000 00
4.	Master's valuation of supplies, feed, &c.	307,377 25
5.	Working capital, consisting of cash and credits.....	400,000 00
6.	Expenditures for packing plants.....	817,944 28
		$8,731,461 53

If, however, the valuation be determined by the fair value of the plant in its present condition as an entirety or unit of operation or by the market value of the stock, these figures would be increased to the minimum of the complain-

ants' witnesses—namely, $9,500,000 (pp. 314, 319, 354, 440, 453, 471), which might be made up as follows:

1.	Valuation of land for stock-yards purposes as testified to by Mr. Morse (pp. 192, 330, 331, 344) and exceeded by many witnesses.....	$5,685,240 00
2.	Master's valuation of improvements...	1,480,000 00
3.	Master's valuation of supplies, feed, &c.	307,377 25
4.	Working capital, consisting of cash and credits.....	400,000 00
5.	Expenditure for packing plants.....	817,944 28
6.	Good-will on master's valuation (p. 78)	780,000 00
		$9,470,561 53

These showings would be still more favorable to the appellants if all the property which the stock-yards company owns were included. It is a hard rule which would deny it a return upon property which was purchased for future use in the business and exclude it simply because it does not earn anything as yet. So also as to the horse and mule department. The Attorney-General insists upon deducting the cost of the horse and mule department (brief on original argument, p. 74). Any reasonable and fair business man would at once recognize that accommodations for horses and mules are necessary for any stock-yards, because farmers ship all kinds of live stock; yet, as this department is not affected by the charges and produces little profit on the actual investment, it was thrown out of consideration by the master and court below. This is as unfair as if the legislation had omitted to regulate the rate for sheep or calves, and it were to be held then that the sheep or calf department should be disregarded if it

did not produce much profit. Of course, this claim as to the horse and mule department would never have been hinted at if that branch of the business had shown a substantial profit.

CONCLUSION.

For the foregoing reasons, it is submitted that the Kansas statute in question should be declared in conflict with the Fourteenth Amendment in that its provisions deny to the owners of the stock-yards property at Kansas City the equal protection of the laws by imposing regulations and burdens not applicable to all alike and in that it deprives them of property and liberty without due process of law by attempting to deprive them of the right to earn a reasonable compensation for services rendered to those who may use the yards for their individual convenience and profit and of the right to earn a reasonable compensation or interest upon the fair present value of the property used in this stock-yards business.

Washington, January, 1901.

ALBERT H. HORTON,
WILLIAM D. GUTHRIE,
B. P. WAGGENER,
Of counsel for appellants.

APPENDIX A.

The tables of the master are not correct and fail to accurately summarize the testimony. The following may therefore be of aid to the court. It is carefully based upon the testimony in the record, and starts from 1884, when the new corporation was organized with a capital stock of $1,990,000 issued for property worth at least that amount. These figures as to profits are taken because they are testified to by the Attorney-General's own expert accountant (pp. 742, 745, 746).

Year.	Capital stock issued.	Profits.	Cash dividends paid.	Percentage of dividend paid.	Stock issued at par for additional cash actually paid in since 1884.	Stock dividends representing undistributed net profits invested and capitalized.	Stock dividends representing increased value of lands.	Stock issued at par to Armour & Co. instead of $500,000 for packing plant.
1884...	$1,990,000.00	.....	$119,391.00	6				
1885...	1,990,000.00	.....	149,250.00	7				
1886...	1,990,000.00	.....	119,400.00	6				
1887...	1,990,000.00	.....	150,600.00	7½	$535,000.00	$456,933.00	$1,058,067.00	
1888...	4,040,000.00	.....	282,800.00	7				
1889..	4,040,000.00	.....	323,200.00	8				
1890...	4,040,000.00	.....	323,200.00	8	900.00	404,000.00		
1891...	4,444,900.00	.....	311,143.00	7				
1892...	4,444,900.00	.....	370,592.00	8	.....	.....	.....	$500,000.00
1893...	4,944,900.00	.....	296,694.00	6	55,100.00			
1894...	5,000,000.00	.....	451,133.50	9	1,667,100.00	268,100.00		
1895..	6,935,200.00	.....	554,816.00	8				
1896...	7,368,650.00	$486,226.50*	429,160.50	6	.....	433,450.00		
Total...	.....	.....	$3,881,380.00	.....	$2,258,100.00	$1,562,483.00	$1,058,067.00	$500,000.00

*After deducting improvements, $169,584.65.

APPENDIX B.

EXTRACTS FROM TESTIMONY OF WITNESSES CALLED BY DEFENDANT ATTORNEY-GENERAL BOYLE AS TO VALUE OF LANDS.

E. S. MERRILL (pp. 605 *et seq.*):

"A. (p. 618). When I was asked to put a price on this, this was vacant land without anything on it; it was unplatted and vacant land; I put a valuation on it in that shape. Now, you want me to say how much it is worth after it is platted, been improved, and business established; all its surroundings established, which will make property valuable, if there is any value in the property. Now, I have put that price on the land and say it is perfectly vacant just as it was left by nature.

BY MR. BOYLE (p. 619): And in the market for sale?

A. If you are going to improve the property and its surroundings, that is an entirely different thing; I will work on it with you, but that is not cross-examination on values.

Q. Now, then, in making up your valuation with reference to the tract marked E, you consider that as naked-acre property without any improvements and without any business on it at all?

A. Yes, sir.

Q. That is the fact, is it?

A. Yes, sir.

Q. (p. 621). Then, as I understand your testimony, Mr. Merrill, you are not testifying about the value of the property as it stands to-day in its present condition. Is that the fact?

A. Not improved property.

Q. You are not testifying about the value of the tract E as it stands to-day?

A. Not improved property.

Q. You can answer that question yes or no. You are not testifying about the value of tract E as it stands to-day?

A. No.

Q. I call your attention to the tract C and ask you to state to the special master what is your best judgment as to the value of that property as it stands in its present condition to-day?

A. I don't know.

Q. Then when you testify about the value of the property marked C you do not testify about its actual value as it stands to-day, do you?

A. No, sir.

Q. (p. 622). Do you know what the present actual value of the tract marked B is; just as it stands to-day?

A. No, sir."

C. D. PARKER (p. 629 *et seq.*):

"Q. (p. 632). In placing the valuations on these tracts A, B, C, D, and E did you take into consideration the use to which this land is being put by the stock-yards company?

A. No, sir; we took into consideration the prices of property adjacent to the stock-yards, together with the surroundings.

Q. (p. 633). Where else in that vicinity could they find any such a body of land?

A. There is no such property, except west of the stock-yards, that is available right near that point for such purposes. . . .

Q. Suppose they went in there to condemn 25 acres and you sat on the jury—

A. It would not be practicable; it could not be done.

Q. (p. 634). They could not buy it for any price that would be within reason, could they?

A. No, sir.

Q. (p. 636). And if another stock-yards company should come in, do you think it could procure as desirable a location in the bottoms?

A. I don't think it could.

Q. That being the case, Mr. Parker, am I right in concluding that in your judgment the present location of the Kansas City Stock-Yards is peculiarly well adapted for their purposes?

A. With the surroundings; yes, sir.

Q. (p. 645). Now, state, if you can, what is the actual present value of the land for stock-yards purposes.

A. I don't know, Mr. Hite."

E. F. ALLEN (pp. 657 *et seq.*):

"Q. (p. 666). In making your estimate of values you were not influenced by the value of the use to which the lands were being put by the company?

A. No, sir.

Q. Not at all?

A. No, sir.

Q. (p. 670). Now, assume that the Kansas City Stock-Yards people have been prosperous, would you say, Mr. Allen, that their proximity to the packing-houses and their proximity to the railroad terminals was an element of their prosperity?

A. Oh, yes; that enters into it.

Q. Is that such an element of prosperity as would be destroyed by the removal of the yards two miles from their present location? I will not—destroyed, but impaired.

A. It would greatly impair it, I should judge.

Q. The fact is, to get the idea clearly, that the present location of the stock-yards, everything considered, is one of the best that they could have?

A. Very attractive location, I would judge; of course, I am not familiar with their business.

Q. In a general way, that is true?

A. Yes, sir.

Q. Considering all the questions that you have been asked and the answers that you have made, what, in your opinion, is the value of this property that you valued to the stock-yards company?

A. I don't know."

R. E. CABLE (pp. 678 *et seq.*):

"Q. (p. 683). What, in your opinion, is that tract E worth just as it stands to-day?

A. For general purposes or the purposes for which it is being used?

Q. For the purposes for which it is being used.

A. Certainly I could not answer that question.

Q. You do not know?

A. No, sir.

Q. I call your attention to the tract B. What is that worth as it stands there to-day for the purposes for which it is being used?

A. To the stock-yards company?

Q. Yes.

BY MR. BOYLE: With all of the improvements on it?

BY MR. HITE: Yes, sir; just as it stands to-day.

A. I certainly don't know.

Q. (p. 689). What do you mean by general purposes?

A. For drug stores, groceries, saloons, or any other business or for residences; any business you choose to consider.

Q. Wouldn't it be worth the prices we have been considering for packing-house purposes?

A. I couldn't answer.

Q. Wouldn't it be worth that for railroad purposes?

A. That I don't know.

Q. (p. 690). Do you know what the value of the stock-yards property is to-day as it stands?

A. The land, you mean?

Q. (p. 691). The real estate belonging to the stock-yards company, just as it stands to-day.

A. No, sir; I have got my judgment on the value of the lands of the company. You mean the improvements, also?

Q. Just as I stated; just as you look at it to-day; do you know what is the value?

A. I don't; and no person living except the stock-yards people can answer that question.

Q. Would they know?

A. Yes; what it was worth to them.

Q. Wouldn't they know better than anybody else what it was worth?

Objection as improper cross-examination. Objection sustained.

Q. Then, as I understand you, the value which you have put upon this property is the value it would possess if it were a farm located down there in the bottoms?

A. Certainly."

C. W. WHITEHEAD (pp. 692 *et seq.*):

"Q. (p. 696). What is this property marked A, B, C, D, and E worth for stock-yards purposes?

A. I don't know.

Q. What is the value of this property for railroad purposes?

A. I don't know.

Q. What is the value of this property for packing-house purposes?

A. I don't know anything about the packing-house business. . . .

Q. What would be the value of that property for packing-house purposes?

A. I have stated, I believe, that I don't know.

Q. (p.697). These pieces of land concerning which you have testified are valuable for stock-yards purposes, are they not?

A. Yes, sir.

Q. Is it not a fact, Mr. Whitehead, that they are more valuable for stock-yards purposes than for any other purpose?

A. They are at present; yes, sir.

Q. (p. 699). I am excluding from consideration that period. In placing the values which you have given upon these tracts of land, Mr. Whitehead, you have excluded entirely, have you not, the use to which that land is being put at the present time?

A. In arriving at our values we tried to get the values of the property that was not affected by any railroad extension or stock-yards extension.

Q. You excluded both?

A. Yes, sir."

EXTRACTS SHOWING CHARACTER OF CROSS-EXAMINATION OF COMPLAINANT'S WITNESSES BY ATTORNEY-GENERAL BOYLE.

J. W. FERGUSON, an old resident of Kansas City, and an owner of property in the vicinity of the stock-yards (pp. 480, 487, 488):

"Q. (By ATTORNEY-GENERAL BOYLE.) That is true, but we will suppose that somebody was going to locate a stock-yards or a wholesale house, or anything else in here, and there was two or three hundred acres of land vacant down there?

A. You are going to start a new town, are you?

Q. No; I am not going to start a new town at all; I am just taking the conditions which exist there except that the stock-yards are gone. You are giving the value of this raw land.

A. Yes; that is right.

Q. You are taking away the stock-yards; there is no superstructure on the land, and you are going to fix a value on the land for business purposes, not because there is any business on it, but because it is available for business purposes, because it is in the middle of Kansas City. Take away these yards—

A. Take away Kansas City?

Q. No; I simply say here is a lot of raw land down there, two hundred acres of it. You say that land is valuable because the railroads want it, because the packing-houses want it, and because other kinds of industries want it; that is not only valuable for stock-yards purposes at seventy thousand dollars an acre, but it is valuable for these other purposes, is it not?

A. All these things go into it to make that value.

Q. Then take the stock-yards away and we will leave these other things there.

A. Take away the live-stock industry, is that the idea?

Q. No; I am not going to take away the live-stock industry; I am going to take away these yards, and then if anybody wants to come in there and locate yards or buy property for railroad terminals they can do so. Now, do you say that property would be worth in a body, as naked land, fifty or sixty thousand dollars an acre?

A. I appeal to the court that that is not a fair question.

Q. If you can answer it, do so.

A. I can answer it, but the point is here: I say these things are all a growth; the stock-yards is a growth, the manufacturing is a growth, the railroad industry is a growth; it has taken 25 years to make them. Now, you propose to wipe out all the advancement of 25 years and start back 25 years."

ALBERT MARTY testified at page 562:

"I said that the value, the purchase price, of that property twenty years ago—I presume it was more than twenty years ago—is no criterion as to its value to-day; property that I could have bought then for seventy-five dollars an acre is now selling for a thousand dollars a foot.

Q. (By ATTORNEY-GENERAL BOYLE.) Suppose these stock-yards were not there?

A. The very fact of the stock-yards being there and being surrounded by the packing-houses has had a tendency to enhance the value of the property there very much.

Q. I understand that, but they have given us the value of their improvements, and we want to get at the value of the raw land.

A. I am not speaking of the improvements; I am speaking of the raw land.

Q. I am taking away the stock-yards.

A. I don't see how you can do it.

Q. I can't do it by burning them down or anything of that kind, but I ask you if you can give us the value of this land for anything except stock-yards purposes?

A. If there was no Kansas City here, that land wouldn't be worth five dollars an acre."

APPENDIX C.

Summary of Annual Statement of Receipts and Disbursements of 275 State Banks doing business in the State of Kansas for the year ending December 31, 1897.

RECEIPTS.

Undivided profits January 1, 1897	$392,895 39
Interest and discount	1,345,196 01
Exchange	128,233 51
Rents	51,847 58
Commissions	26,091 89
Profit on real estate sold	2,473 51
Assessment on capital	4,000 00
Increase of capital	5,400 00
Reduction of capital	188,201 00
From surplus	89,551 11
All other sources	42,439 76
Total	$2,276,329 76

DISBURSEMENTS.

Officers' salaries	$355,323 57
Clerk hire	68,009 84
Rent	27,531 94
Insurance	8,021 42
Taxes	94,974 00
Interest on deposits	153,453 00
Interest on borrowed money	24,208 50
Dividends	283,018 55
Carried to surplus	132,293 15
Bad paper charged off	317,072 27
Loss on real estate sold	6,038 85
Depreciation of real estate	132,957 62
Depreciation of furniture and fixtures	30,050 27
All other purposes	182,343 26
Balance undivided profits	461,033 52
Total	$2,276,329 76

Average capital invested during year	$6,106,665.68
Gross earnings	$1,596,282.26
Per cent. of gross earnings to capital	26.13
Number of banks paying dividends	146
Capital on which dividends were paid	$3,574,900.00
Average dividend paid (per cent.)	**7.91**
Number of banks paying no dividend	129
Capital on which no dividend was paid	$2,531,765.68
Per cent. of dividends to total capital	4.63
Per cent. of officers' salaries to total capital	5.82
Per cent. of taxes to total capital	1.55

(Fourth Biennial Report of State Bank Commissioner of Kansas, 1897–98, page 218.)

APPENDIX D.

SUMMARY.

Summary of Annual Statement of Receipts and Disbursements of 95 Private Banks doing business in the State of Kansas for the year ending December 31, 1897.

RECEIPTS.

Undivided profits, January 1, 1897	$131,521 13
Interest and discount	376,817 64
Exchange	36,187 31
Rents	22,467 35
Commissions	10,922 76
Profit on real estate sold	1,660 61
Reduction of capital	69,000 00
Received from owners	33,322 67
Increase of capital	6,000 00
Surplus charged off	13,900 00
All other sources	5,827 97
Total	$707,627 44

DISBURSEMENTS.

Officers' salaries	$69,385 02
Clerk hire	30,022 00
Rent	5,432 98
Insurance	2,759 59
Taxes	28,328 11
Interest on deposits	34,597 87
Interest on borrowed money	5,066 46
Dividends	113,829 97
Carried to surplus	54,766 56
Bad paper charged off	135,643 94
Loss on real estate sold	347 15
Depreciation of real estate	29,174 50
Depreciation of furniture and fixtures	11,530 67
All other purposes	48,726 34
Balance undivided profits	138,024 28
Total	$707,627 44

Average capital invested during the year	$1,329,431 57
Gross earnings	585,404 77
Per cent. of gross earnings to capital	44 00
Number of banks paying dividends	48 00
Capital on which dividend was paid	627,380 00
Average dividend paid (per cent.)	**18 14**
Number of banks paying paying no dividend	47
Capital on which no dividend was paid	702,051 57
Per cent. of dividends to total capital	8 56
Per cent. of officers' salaries to total capital	8 22
Per cent. of taxes paid to total capital	2 13

(Fourth Biennial Report of State Bank Commissioner of Kansas, 1897-98, page 219.)

APPENDIX E.

EXTRACTS FROM THE AUDITOR'S REPORT FOR THE STATE OF KANSAS FOR 1897–98, CONCERNING MUNICIPAL BONDS AND THE RATES OF INTEREST THEREON.

NAME OF COUNTY, TOWNSHIP, ETC.	PURPOSE CREATED.	DATE OF ISSUE.	DATE OF MATURITY.	RATE.	AMOUNT.
ALLEN COUNTY.					
Marmaton Township	St. L. S. & W. R. R.	Sept. 1, 1887.	Sept. 1, 1901.	7	$20,000
Iola Township	" "	"	"	7	33,500
Elm Township	" "	"	"	7	20,000
Iola City	" "	"	"	7	26,500
ANDERSON COUNTY.					
Anderson County	L. L. & G. R. R.	Jan. 1, 1870.	Jan. 1, 1900.	7	9,000
Ozark Township	St. L. & E. R. R.	July 31, 1886.	July 31, 1916.	7	16,000
Indian Creek Township	" "	July 31, 1887.	July 15, 1917.	7	10,000
BARBER COUNTY.					
Barber County	Funding			8	143,000
Medicine Lodge Township	Bridge Bonds	Jan. 30, 1886.	July 1, 1916.	7	10,000
Kiowa Township	Railroad Bonds	April 1, 1887.	July 1, 1907.	7	25,000
Hazleton Township	" "	Mar. 1, 1889.	Mar. 1, 1907.	7	15,000
BUTLER COUNTY.					
El Dorado City	St. L. Ft. S. & W. Ry.	Jan. 22, 1883.	Jan. 22, 1903.	7	2,500
" "	Improvement	Aug. 1, 1883.	Aug. 1, 1903.	7	7,000
Augusta Township	St. L. & S. F. R. R.	June 5, 1880.	May 5, 1910.	7	23,000
Benton Township	St. L. Ft. S. & W. Ry.	Jan. 1, 1883.	July 1, 1903.	7	6,500
Bruno Township	St. L. & S. F. R. R.	June 5. 1880.	May 5, 1910.	7	17,000
CHEROKEE COUNTY.					
City of Columbus	R.R. Funding Bonds	Oct. 24, 1876.	Oct. 24, 1896.	10	12,000
Weir City	Water Bonds	June 30, 1887.	June 30, 1897.	10	1,000
CHEYENNE COUNTY.					
Wano Township	Building Bridge	Jan. 16, 1889.	Jan. 1, 1899.	10	1,000
CLAY COUNTY.					
Clay County	J. C. & Ft. K. R. R.	Feb. 16, 1872.	Feb. 16, 1902.	7	13,000
" "	Bridge	Aug. 4, 1885.	Aug. 4, 1905.	7	10,000
CLOUD COUNTY.					
Elk Township	Bridge	July 1, 1878.	July 1, 1898.	10	8,000
" "	Railroad	Sept. 1, 1878.	Sept. 1, 1908.	8	7,850
" "	"	Oct. 1, 1879.	Oct. 1, 1908.	8	12,150
Solomon Township	"	Nov. 1, 1879.	Nov. 1, 1909.	8	7,000
" "	Bridge	Jan. 1, 1885.	Jan. 1, 1895.	8	2,000
COFFEY COUNTY.					
Avon Township	K. C. B. & S. F. Ry.	Mar. 31, 1877.	Mar. 31, 1907.	7	87,000
Leroy Township	St. L. & E. R. R.	Jan. 21, 1887.	Jan. 21, 1917.	7	5,000
Liberty Township	Interstate R. R.	July 14, 1887.	Apl. 25, 1917.	7	10,000
" "	" "	Apl. 25, 1887.	July 14, 1917.	7	5,000
Neosho Township	" "	Oct. 6, 1886.	Apl. 25, 1917.	7	10,000
ELK COUNTY.					
Elk Falls Township	K. C. L. & S. K. Ry.	Oct. 1, 1879.	Oct. 1, 1909.	7	15,000
Wild Cat Township	" "	"	"	7	4,000
Pawpaw Township	K. C. & S. Ry.	Jan. 1, 1880.	Jan. 1, 1910.	3	8,000
Howard Township	" "	"	"	8	24,000
Greenfield Township	K. C. L. & S. K. Ry.	Dec. 1, 1879.	Dec. 1, 1909.	7	11,500
HAMILTON COUNTY.					
Syracuse Township	Bridge	June 1, 1887.	July 1, 1897.	8	4,500
Syracuse City	Improvement	Jan. 1, 1888.	July 1, 1908.	7	3,000
" "	City Hall	July 2, 1888.	July 1, 1909.	7	7,500
Coolidge City	School Bonds	June 5, 1887.	Jan. 1, 1902.	7	11,000
HASKELL COUNTY.					
Old Review Township	Poor Farm	June 6, 1889.	July 6, 1909.	7	1,500

Name of County, Township, etc.	Purpose Created.	Date of Issue.	Date of Maturity.	Rate.	Amount.
Hodgeman County.					
Sterling Township	Bridge	Oct. 10, 1885.	Oct. 10, 1897.	8	$500
" "			Oct. 10, 1898.	8	500
" "			Oct. 10, 1899.	8	500
" "			Oct. 10, 1900.	8	500
Kearny County.					
South Side Township		Dec. 21, 1886.	1906.	8	12,578
Lakin Township	Bridge	Jan. 18, 1886.			
Linn County.					
Linn County	Jail & Sheriff's res.	Aug. 25, 1896.	Feb. 1, 1899.	7	
Blue Mound Township	St. L. & E. R. R.	May 20, 1885.	Apl. 10, 1912.	7	25,000
Labette County.					
Oswego Township	M. W. Ry.	Dec. 30, 1876.	Jan. 1, 1897.	10	2,200
Richland Township	M. K. & T. Ry.	July 1, 1870.	July 1, 1890.	7	50,000
Pleasant Township	St. L. W. & W. Ry.	Nov. 14, 1879.	July 1, 1909.	7	9,000
McPherson County.					
Smoky Hill Township	Railroad	Sept. 3, 1879.	Sept. 3, 1909.	7	14,740
McPherson Township	"	Jan. 1, 1880.	Jan. 1, 1910.	7	20,000
Montgomery County.					
Montgomery County	L. L. & G. R. R.	July 2, 1877.	July 2, 1907.	7	153,000
Louisburg Township	S. K. R. R.	Aug. 7, 1879.	Aug. 1, 1909.	7	15,000
Mitchell County.					
Mitchell County	A. S. V. & D. Ry.	Sept. 16, 1878.	Sept. 16, 1908.	8	50,000
Cawker Township	" "	May 31, 1879.	May 31, 1909.	8	20,000
Glen Elder Township	" "	"	"	8	5,000
Neosho County.					
Mission Township	Bridge		June 1, 1902.	10	40,000
Norton County.					
Norton City	C. K. & N. R. R.	Dec. 1, 1890.	Dec. 1, 1900.	10	200
Osborne County.					
Sumner Township	Railroad	Dec. 20, 1879.	Dec. 20, 1909.	8	15,000
Penn Township	"	Aug. 15, 1879	Sept. 15, 1909.	8	15,000
Rice County.					
Lyons City	Waterworks	Sept. 22, 1885.	Sept. 1, 1900.	7	2,000
" "	"	"	Sept. 1, 1907.	7	3,000
Saline County.					
City of Brookville	City Hall	July 1, 1879.	July 1, 1899.	10	2,000
Scott County.					
Ninnescah Township	St. L. Ft. S. & W. Ry.	Aug. 1, 1884.	Aug. 1, 1904.	7	22,000
Ohio Township	" " "	"	"	7	10,000
Sumner County.					
City of Caldwell	Funding	Aug. 11, 1882.	Aug. 11, 1897.	8	3,000
" "	Bridge	"	"	8	2,500
Washington County.					
Washington Township	Railroad	July 1, 1877.	Jan. 1, 1907.	10	26,000
Wilson County.					
Center Township	C. V. & L. Ry.	July 1, 1886.	July 1, 1916.	7	25,000
Prairie Township	" " "	"	"	7	15,000
Center Township	C. K. & W. R. R.	Nov. 1, 1886.	Nov. 1, 1916.	7	25,000

(Extracts from the Eleventh Biennial Report of the Auditor of State of the State of Kansas for 1897-98. See pages 186-223.)

IN THE

Supreme Court of the United States.

CHARLES U. COTTING, *Complainant*,

v.

KANSAS CITY STOCK YARDS COMPANY, a corporation, CHARLES F. MORSE, HARRY P. CHILD, EUGENE RUST, ELLIOTT E. RICHARDSON, and LOUIS C. BOYLE as Attorney-General of the State of Kansas, *Defendants*.

FRANCIS LEE HIGGINSON, *Complainant*,

v.

KANSAS CITY STOCK YARDS COMPANY, a corporation, CHARLES F. MORSE, HARRY P. CHILD, EUGENE RUST, ELLIOTT E. RICHARDSON, and LOUIS C. BOYLE as Attorney-General of the State of Kansas, *Defendants*.

No. 237, OCTOBER TERM, 1898.

(Causes 7427 and 7453, U. S. C. C., Dist. of Kansas, First Division.—Consolidated.)

MOTION TO ADVANCE.

And now comes the defendant Louis C. Boyle, as Attorney-General of the State of Kansas, and moves the court to advance these causes (consolidated) for hearing at an early day during the present term of this court, and before the Holi-

day recess; and as reasons for such advancement this defendant says:

1. These two causes (consolidated for trial) were commenced by two stockholders of the Kansas City Stock Yards Company (a Kansas corporation) challenging the validity of an Act of the legislature of Kansas, being Chapter 240, Session Laws of 1897, entitled "An Act defining what shall constitute public stock-yards, defining the duties of the person or persons operating the same, and regulating all charges thereof, and removing restrictions in the trade of dead animals, and providing penalties for violations of this Act," approved March 3, 1897, published March 12, 1897.

The act in question materially reduced the charges formerly exacted by the Stock Yards Company for yardage, care and feeding of live stock, and the two stockholders each applied for an injunction to restrain said company from putting in force the reduced rates prescribed by the statutes, and to enjoin the Attorney-General of the State from enforcing the Act. The main contentions of the Complainants were that the act was in contravention of that part of Section 1 of the Fourteenth Amendment to the Constitution of the United States which forbids a state from depriving any person of his property without due process of law, or denying to any person within its jurisdiction the equal protection of the laws; and that the act was further violative of that clause of Section 8 of Article 2 of the Constitution which vests in the Congress the power to regulate commerce among the several states. Tem-

porary restraining orders were granted by the District Judge (Foster). Afterward on preliminary hearing several questions were decided, but the cases were referred to a master to take evidence and report the facts upon the principal issues (79 Fed. 679). After the coming in of the report of the master, the district judge (Foster) decided all the remaining questions in favor of the Attorney-General (82 Fed. 839). Application was then made by the complainants for a rehearing before Circuit Judge Sanborn, at St. Paul. The parties duly appeared and there entered into a written agreement for the immediate completion of the issues and for a final hearing on the merits and the master's report October 18, 1897, before Circuit Judge Thayer and District Judge Foster, the fourth clause thereof being as follows:

"The unsuccessful party on said hearing shall immediately take the necessary proceedings to appeal the said causes to the proper court of appeals, and file the record therein, *and both parties shall join in an application to the court to which the appeal shall be taken to advance the cases upon the docket of said court, and as far as they are able to secure a speedy hearing of said appeal.*"

The causes were heard together as agreed, and the hearing resulted in a decision in favor of the Attorney-General on the merits, the Circuit Judge (Thayer) concurring generally in the views formerly expressed by the District Judge (Foster) (82 Fed. 850).

The complainants appealed the cases to this court, and, of course, will concur in their advancement to "a speedy hearing" as stipulated.

2. These cases involve large public interests as well as those of said Stock Yards Company and its stockholders. The reduction in the rates by the enforcement of the new law amounts to about $300,000 per annum. If it is a valid enactment, and the Stock Yards Company continues to enforce the old rates, the shippers who patronize these yards are now compelled to pay an unjust tribute of about $300,000 annually to the Stock Yards Company; and two able Federal Judges have held the Act valid; and so far there is no dissent. This presents a very strong reason why the cases should be speedily heard and decided. That each shipper may have a right of action to recover back any illegal charges (if such right exists) is a poor reason for the undue continuance of a state of affairs making such a multiplicity of suits necessary to the attainment of justice.

3. On the preliminary hearing in April, 1897, the District Judge (Foster), as a condition of the continuance in force of the restraining orders, required a bond of $75,000 for the protection of the shippers and the repayment to them of any excessive charges, if it should be finally decided that said Act of the legislature is valid. On the final hearing a like bond of $200,000 was required of the Stock Yards Company as a condition for the stay of all proceedings under the Act until an appeal, to be taken within ten days, should be heard and determined by this court (82 Fed. 857). It is not clear whether both bonds (which were seasonably given) are now in force or not. If, however, the last should be held as cumulative to the first, the security is yet wholly inadequate.

It is now eighteen months since the first bond was required, and the excess over the statutory charges already amounts to about $450,000.

4. This defendant is informed and verily believes that since the final hearing of these consolidated causes, the said Kansas City Stock Yards Company has made a deed or deeds purporting to convey and transfer all its lands and other property in Kansas to a corporation created under the laws of the State of Missouri with the view of evading the repayment of excessive and illegal charges for yarding, taking care of, and feeding live stock in said Kansas City Stock Yards.

5. These causes have been pending in this court for several months, but this defendant is informed and verily believes that although the Clerk of this court long since made an estimate of the fees for editing and printing the record as required by the rules of this court, and gave due notice thereof to counsel for complainants, yet said fees have not been paid and the record has not been printed.

L. C. Boyle
Attorney General

David Martin
Of Counsel.